84-1171

Office-Supreme Court, U.S.
FILED
JAN 19 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN W. JENRETTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the Executive Branch use of undercover agents, led by a convicted confidence man, to corrupt a Congressman who had committed no crime and was not even suspected of any criminal activity, violates the due process guarantee of the Fifth Amendment and infringes upon the independence of Congress guaranteed by our Constitutional separation of powers.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, John W. Jenrette, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 18, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 744 F.2d 817, and is appended hereto at p. 1a. The Order of the Court of Appeals denying the motion for reconsideration is not reported and is appended hereto at p. 70a. The Order of the Court of Appeals denying petitioner's suggestion for rehearing *en banc* is not reported and is appended hereto at p. 71a. Petitioner's motion for judgment of acquittal or in lieu thereof for a new trial was denied on August 4, 1983, in an opinion by U.S. District Judge John Garrett Penn. It is not reported and is appended hereto at

p. 19a. The Order of the District Court denying that motion was filed on August 4, 1983. It is not reported and is appended hereto at p. 66a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* were denied on October 22, 1984. The Chief Justice granted petitioner's application for extension of time in which to file this Petition to and including January 20, 1985. This Court's jurisdiction is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case raises questions under the requirement of the Fifth Amendment that "[n]o person shall . . . be deprived of . . . liberty, or property, without due process of law" and the principle of separation of powers. Relevant provisions of 18 U.S.C. §§ 2, 201 and 371 are appended hereto at p. 72a.

STATEMENT OF THE CASE

This is possibly this Court's last opportunity to review ABSCAM's sordid spectacle of the Executive Branch unleashing unsavory confidence men against members of the Legislative Branch to test their integrity and moral fiber. In this most egregious of the cases, ABSCAM's chief operative, a convicted swindler, pursued and corrupted petitioner, not because reason existed to believe he was corrupt but because personal weaknesses made him an easy mark.

The Conduct of ABSCAM

The federal government initiated ABSCAM in the spring of 1978, by creating a fictitious organization named Abdul Enterprises that purportedly represented Arab sheiks seeking large investment opportunities within

the United States. This enterprise sought at first to recover stolen art works and securities, but in July 1979, switched to a new scenario devised to test the integrity of members of Congress by offering them bribes. FBI agent Anthony Amoroso played the role of the company's chairman, while an undercover operative, Mel Weinberg, posed as its chief financial advisor.

Weinberg was a lifetime swindler convicted and sentenced to three years imprisonment in 1977 on multiple counts of fraud, but paroled from federal prison so he could use his swindling techniques for the FBI (21a). Weinberg began at a monthly salary of $1,000, later raised to $3,000 plus a bonus based on the number of indictments and convictions he could muster. Joint Appendix, *United States* v. *Jenrette*, No. 83-2281, Crim. No. 80-289, D.C. Cir. (hereinafter JA) II 595, 596. His general supervisor, FBI agent John Good, recommended a final payment of $100,000. JA II 624. Indeed, the trial judge described him as a "modern day bounty hunter" (43a).

Weinberg's ABSCAM scenario called for him to let it be known that the sheiks had up to $200,000,000 on deposit in the Chase Manhattan Bank that they wanted to invest in the United States. After initial contacts with entrepreneurs seeking financing from the sheiks, Weinberg would suggest that "it was the Arab way of business" to include high public officials in the dealings. Once such public officials had been involved, Weinberg would press to meet with them, generally at a townhouse on W Street in Washington, D.C., where they could be secretly videotaped.

Weinberg would report that the sheiks were favorably disposed toward the investment of millions of dollars in the Congressman's district, then inform the Congressman that the sheiks might someday need American asylum from Palestinian terrorists. If the Congressman re-

sponded favorably to this suggestion of asylum, Weinberg would suggest that it was the Arab way to reward the Congressman with cash gifts, and press him to take as much as $50,000 on the spot, with more to follow when private immigration legislation was introduced.

Department of Justice guidelines attempted to keep FBI agents and informants on the side of the law in operations like ABSCAM. Investigation was not to be undertaken without "a valid factual predicate," and proposals for legitimate financing by Abdul Enterprises were not to be pursued. *Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice*, S. Rep. No. 97-682, 97th Cong., 2d Sess 504 (1982) (hereinafter Select Committee Final Report); JA II 602, 528. Informants were to detect and prevent crime, not to instigate it. *Hearings on the F.B.I. Statutory Charter Before the Senate Judiciary Committee*, 95th Cong., 2d Sess. 34-35 (1978). Moreover, to ensure compliance with such rules the Department required that all undercover agents and informants tape or otherwise memorialize all conversations; if this was impossible, they were promptly to "debrief" on a Form 302 with all the salient facts. Select Committee Final Report 83-93.

Weinberg violated the recording requirements as well as the others with impunity. His FBI superiors failed to debrief him on Form 302's, and indeed gave him *carte blanche* to disregard Department of Justice guidelines and regulations generally.

The failure to supervise Weinberg prevailed all the way up the line. Agent Amoroso, who supervised him directly, testified that Weinberg "was at liberty to operate in a manner he saw fit," and that Amoroso himself made various decisions "based solely upon the oral representation of Mr. Weinberg." J.A. II 253, 267; also see 251, 254, 261, 262, 265. Special Agent John Good, Amoroso's immediate supervisor, based his decisions in

this case entirely "on the discussions I had with Agent Amoroso and with Weinberg." JA II 514. And Thomas Puccio, head of the Task Force in Brooklyn and Good's immediate supervisor, likewise considered no information "that stems from anywhere other than Weinberg." JA II 666-67; also see JA II 663. According to Irwin Nathan, Deputy Assistant Attorney General with responsibility to monitor and coordinate the prosecutions resulting from the FBI's undercover investigative work in ABSCAM, "The undercover operatives were permitted to make the decision." JA II 525.

In short, the Department of Justice effectively turned over to convicted con man Weinberg total control of an operation aimed at enticing Congressmen into prosecutable acts, for which Weinberg could then claim his bounty hunter's reward. One of those who succumbed to Weinberg's blandishments, and the victim of the near-total disregard for the Department's guidelines to ensure fairness and due process was petitioner Jenrette.

ABSCAM's Pursuit of John Jenrette

John Jenrette was first elected to the House of Representatives in 1974 and re-elected in 1976 and 1978. In 1979, when he was caught up in ABSCAM, he was suffering from chronic alcoholism, aggravated by legal and financial problems that left him hopelessly in debt. JA II 470. Some months before his ABSCAM problems, he had undergone unsuccessful treatment at an alcoholism clinic in Texas. JA II 375. Finally, in March 1980, he entered the government's Tri-Services Center for alcoholics in Bethesda, Maryland and was diagnosed by experts there as suffering from "a physical and mental dependence on alcohol," hallmarks of which include a compulsion to drink and serious impairment of judgment. JA II 410-11, 414-15, 418-25. Moreover, the quantities Jenrette was then imbibing could cause "unreal fears"

and a "chronic, paranoid state." JA II 421-22. This is significant, for as the trial court found, Weinberg and Amoroso deliberately acted the part of mobsters. JA II 353, 31a, n.16. Asked if Jenrette's condition might cause one "to see mobsters who aren't really mobsters and threats," the doctor replied, "The hallmark of paranoia is unreasonable fears or false beliefs and the individual acting upon those unreal or false beliefs." JA II 422.

An alcoholic like Jenrette was the perfect mark for an experienced con man like Weinberg. The pursuit began in early October 1978, when Weinberg called Jack Morris, a constituent of Jenrette's charged with securities forgery, and suggested that Morris get Jenrette involved in his criminal problem—because " 'he's a lush anyhow. Give him a few drinks and he'd do anything.' " Morris refused with indignation: "I have never in my life took advantage of a drunk." JA II 438-39.

Later that month Weinberg made another effort, this time through John Stowe, an old friend of Jenrette, looking desperately to make a comeback as an entrepreneur. Weinberg was attempting to have Stowe arrange for certificates of deposit to be smuggled into the United States through a "Congressman contact." JA III 916-20. Stowe called Jenrette with his proposition, but Jenrette said "no," telling Stowe that "all he had to do to bring the money in was to register it so that taxes would be paid." JA II 452.

Stowe was also pursuing discussions with Weinberg concerning legitimate Abdul Enterprises financing for various business ventures. The Weinberg-Stowe conversations for which tapes exist[1] show that over and over rather than promptly rejecting Stowe's legitimate proposals as Justice Department guidelines directed, Wein-

[1] Throughout their relationship, Weinberg taped his conversations with Stowe on a selective basis, and since he was not debriefed by his supervising agents, the evidence of what transpired in this case is skewed at Weinberg's choice. See p. 4, *supra*.

berg used them as bait to involve Jenrette. One that Weinberg particularly exploited to string Stowe along, so he would pull in Jenrette, involved the American Gear & Pinion Company in Jenrette's Congressional district, which had employed up to 500 workers and was failing.

A telephone conversation of April 25, 1979 is illustrative. Weinberg opened the discussion with Jenrette's personal financial problems. Weinberg then promised to look at Stowe's own loan request for American Gear & Pinion, but immediately resumed pressure to involve Jenrette: ". . . you have got to remember, you can't get a hundred percent financing today, unless you got a lot of juice . . . like we are financing something for, ah, a United States Senator, OK?, . . . there is no problem there . . ." but, Weinberg continued, if the entrepreneur is "a poor schnook . . . Forget it, it can't be done today. . . . You got [to] have the juice behind you." Stowe finally caught on, and said he would call Jenrette that evening. JA III 887-93.

In numerous similar telephone conversations Stowe continued to plead for American Gear & Pinion and other legitimate ventures, while Weinberg repeatedly pretended an interest, pressed him to have Jenrette call and reminded him that "Arabs are the type of people, they always like to have friends in high office. . . . This is their way of life. . . . And by him doing something for the Congressman, he has got a friend in high office." JA III 900-904; also, e.g., JA III 935-39, 894-99.

This relentless pursuit of Jenrette, as the trial judge found, was not motivated by any suspicion that he was corrupt or seeking bribes (38a). Special Agents Amoroso and Good had made no effort to verify any of Stowe's or Weinberg's information. JA II 255. Agent Good admitted that he decided to go after Jenrette merely because "it was a loose end that had to be clarified to the best of our ability prior to the conclusion of the covert stages," and that there was no evidence prior to Novem-

ber 15, 1979 that Jenrette would do anything wrong. JA II 515, 509.[2]

Despite this total lack of predicate or probable cause, on November 15 they decided to put Jenrette's virtue to the test. Weinberg thereupon called Stowe and, according to his trial testimony, said that the sheik had a problem and "we might have to bring him into the country and for this," he said, "we are willing to pay $50,000 down now and $50,000 down later." He asked Stowe to set up a meeting with Jenrette, arranged later that day for December 4. JA II 306-07.

A preliminary meeting took place on December 3, without Jenrette, so Stowe could become acquainted with "Tony DeVito" (Amoroso's alias). Weinberg, Amoroso and Stowe discussed a $50,000 payment. JA III 717, 719. JA II 228; JA III 951. Twice Stowe admitted that he had not told Jenrette this purpose for the next day's meeting, but agreed to do so. JA III 720, 725. The next day Stowe related the sheiks' asylum problem, disclosed the bribe offer, and discussed his American Gear & Pinion prospects with Jenrette over lunch. Immediately afterwards Weinberg called Stowe to confirm plans for the meeting. He also warned him:

> You gotta remember one thing now Tony is a tough guy. He's [referring to Jenrette] gotta his yaknow tell us he's gonna do it. JA III 712.

Early that evening Stowe and Jenrette went to ABSCAM's W Street townhouse. Amoroso, who did not even know whether Jenrette knew of the bribe offer, JA II 277, still had no reason to anticipate that he would accept one. During the meeting Jenrette drank martinis;

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[2] Weinberg and his confederates had no belief in anything Stowe was telling them (including, apparently, a laughing offhand comment that "he's as big a crook as I am"). JA II 294, 301, 330.

a Congressional colleague who viewed the tape testified that in his judgment, "John was drunk." JA II 371.

The meeting began with a long discussion of the sheiks and their immigration problem. Amoroso had to reassure Jenrette repeatedly that they were not criminals or terrorists, that they had not committed any atrocities, and that it would be a humanitarian act to offer them asylum. JA III 736-47. Jenrette agreed to introduce a private immigration bill and to "be in this corner" because of his friendship with Stowe. JA III 747.

Amoroso then for the first time stated, "we're talkin' about fifty thousand dollars now and fifty thousand dollars when this thing is introduced." JA III 747. Jenrette immediately balked and began to stall, whereupon Amoroso talked about his naming a "figure." JA III 748. The meeting went on at length, as Amoroso continued to pressure Jenrette with promises to bail him out of his own difficulties with a business loan and to invest $5 million in Stowe's American Gear & Pinion venture while insisting that he take the $50,000. Jenrette in the meantime continued to vacillate while Amoroso worked to keep him from refusing or leaving. E.g., JA III 750-51, 762, 768, 769, 777. At one point Jenrette told Amoroso that "there's nothin' I'd rather do than walk out with it," and later that "I got larceny in my blood. I'd take it in a goddamn minute." JA III 770, 772.

But Jenrette did not take it; instead he continued to produce reasons for not taking the money. It would be better to have a Senator introduce the bill; he had introduced similar legislation for a Rhodesian refugee and was having trouble getting it through; the Arabs might commit a criminal act in the future; he needed to review developments in the immigration laws; he had to consult with his law partner. E.g., JA III 744, 745, 757, 759, 763. Amoroso finally asked Jenrette to take the money with him, with the option of returning it at a later date if he decided not to go forward, but Jenrette

responded with reasons why he could not do this either. JA III 768-70. Ultimately, Jenrette left the meeting without the money, but agreed to think it over. JA III 777.

On the next day, December 5, Jenrette told Amoroso that he was ready to go forward, but that he could not come for the money. JA III 788-93. He also expressed fear of Weinberg's and Amoroso's clients: "I don't like cement" (explained at trial as "I was scared of who they were. I meant floating in the bottom of the Potomac or somewhere else.") JA III 792; JA II 457. On December 6, Jenrette finally swallowed the bait. He called Amoroso and asked to have Stowe pick up the money, to which Amoroso reluctantly assented. JA III 797-803. On Stowe's arrival, Weinberg asked, "what's with that guy?" Stowe replied that Jenrette was frightened that "these guys might get mad and come back." JA III 809.

After Stowe had taken the money, Amoroso told Jenrette by telephone that Abdul Enterprises would finance the American Gear & Pinion purchase, then asked "You got the package . . . from John?" Jenrette replied "Everything's fine. I'll do my share of the work." JA III 804-07. ABSCAM went public on February 2, 1980.

The Criminal Proceedings

Jenrette and Stowe were indicted in the District of Columbia on June 13, 1980 on three counts of violation of Title 18, sections 2, 201 and 371 (bribery, conspiracy and aiding and abetting). On October 7, 1980 a jury returned verdicts of guilty on all three counts. Judge Penn then conducted post-trial evidentiary hearings on defendants' motion for judgment of acquittal because the government's conduct violated due process. On August 4, 1983 Judge Penn issued a detailed memorandum denying the motion (19a).

Judge Penn's opinion noted that it was quite clear "that the decision to initiate a bribe offer was made without

probable cause to believe that Jenrette had ever accepted a bribe in the past, or had ever been involved with the law, or that he would accept a bribe at this time" (59a). He further concluded that the entire procedure in this case "appears incredible" considering the stakes involved and the fact that the operation reached "into the halls of the Congress of the United States" (59a-60a). This was not a government effort to detect or to prevent crime, the memorandum stated, but rather "a test of the integrity and moral fiber of a member of Congress" (60a), "an unwholesome spectacle" (65a). Nonetheless, Judge Penn denied the motion for acquittal believing himself governed by earlier decisions (63a-64a).

On December 9, 1983 Jenrette was sentenced to two years imprisonment and a fine of $10,000 on the first count; a similar sentence on the second count (the two sentences to run concurrently with respect to incarceration); and a sentence of two years imprisonment and a fine of $10,000 on the third count; with the court suspending execution of the sentence on the third count and placing Jenrette on probation for a period of five years (68a). Again, at this hearing Judge Penn stated how troubled he was that the case seemed "a test devised to determine whether or not if you were induced you would commit a crime." JA II 701.

On appeal, the conviction was affirmed, the Court below holding (12a) that the requisite "level of outrageousness" is not established by showing

> obnoxious behavior or even flagrant misconduct on the part of the police. . . . Rather, due process guarantees are violated only in the narrow category of cases where the challenged conduct includes "coercion, violence, or brutality to the person."

REASONS FOR GRANTING THE WRIT

1. *There are special and important reasons for the nation's highest Court to review the decision below.* For

courts, FBI, prosecutors and public have all interpreted this Court's silence in the ABSCAM cases as validating executive corruption of members of Congress. In the same vein, this Court's silence has been interpreted as removing every barrier to the use of confidence men and undercover federal agents to tempt members of Congress with bribes when there is neither probable cause nor any suspicion, reasonable or otherwise, to believe that the member would accept such a bribe. A denial of this petition, possibly the last from the ABSCAM group of cases, can only operate as an invitation for a continuation, yes, and even a deterioration, of the practice of tempting with ever more overwhelming bribes and ever more compelling tactics, members of Congress who had, up to the moment of deceitful government temptation, records without blemish. Considerations of due process when the executive targets members of Congress for enticement and prosecution combine with dangers to our cherished governmental separation of powers to call for, even require, this Court's review. The circumstances of this case, the corrupting of Congresspersons not previously corrupt in any way, underline and illuminate the dangers of executive temptation of members of the legislature and afford this Court the best possible vehicle to review this threat to our form of government.

2. *This is the most egregious case of Congressional temptation yet presented to the Court.* As demonstrated in the Statement of the Case, the prosecution had no grounds whatever to believe—nor even the slightest suspicion—that petitioner, Congressman John Jenrette, was in any way prepared to accept the bribe about to be offered. He was targeted, not by a prosecutor or even an FBI agent, but by a convicted confidence man named Weinberg, practiced in the art of exploiting personal weaknesses to induce people to do what they did not intend or want to do, who was released from Federal prison to produce prosecutable cases in exchange for probation. This "modern day bounty hunter", as the trial judge aptly

described him (43a), received bonuses for indictments and convictions and went about his business of tempting Jenrette largely unsupervised (55a). Indeed, Weinberg continually violated the Justice Department's own rules that he tape or be debriefed on all his conversations with those he was seducing. As the trial judge concluded in express terms:

> "In the case of Jenrette and Stowe, it was clear that what the government sought to determine was whether an elected government official could be induced to commit a crime by a convicted professional con man. It was nothing more than a test of the integrity and moral fiber of a member of Congress . . ." (60a).

3. *Wrongdoing here was not limited to executive testing of members of Congress; Jenrette was not targeted either because of any suspicion of wrongdoing or even as part of a random test, but because of his personal weaknesses.* Jenrette was a perfect mark for a con man's advances, not because he was a suspicious character, but because his weakened condition greatly reduced his resistance to Weinberg's blandishments. Weinberg knew that Jenrette, who was recently out of an alcoholic clinic in Texas, was still drinking and thus vulnerable. "Give him a few drinks", said Weinberg, "and he'd do anything." Weinberg knew that Jenrette had incredible personal financial burdens beyond his capacity to meet. So Weinberg (assisted by federal agent Amoroso) offered Jenrette overwhelming financial incentives. One was help with his frightening personal indebtedness. The other, playing on the Congressman's political responsibilities, was the promise to save a plant in his District which employed 500 constituents. When Weinberg and Amoroso pressed the $100,000 bribe on him for asylum legislation,[3] martinis were ready as part of the effort to

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[3] There was, of course, no legitimate law enforcement purpose related to Congressional wrongdoing in asylum legislation. FBI Director Webster has admitted that there has only been one such

persuade him to accept the bribe. They even went so far as to adopt the role of gangsters. While Jenrette was considering the bribe, Weinberg called Stowe with the warning that "Tony [Amoroso]is a tough guy" and Jenrette has "got to, as you know, tell us he's going to do it." This had its intended effect. The word for what happened here is not "temptation"; it is "seduction".

4. *The Court below swallowed this entire mess, interpreting the silence of this Court as indicating that "due process guarantees are violated only in the narrow category of cases where the challenged conduct includes 'coercion, violence or brutality to the person'"* [4] (12a). This standard—drawing the line between physical and non-physical but equally malevolent temptation—was plucked out of whole cloth by the Court below. There is not the slightest hint in this Court's rulings in *Russell* v. *United States*, 411 U.S. 423 (1974) and *Hampton* v. *United States*, 425 U.S. 484 (1976), the two closest "due process" cases, that the level of outrageousness needed to set aside a conviction on due process grounds can only be met where there is physical action by the confidence men or the law enforcement officials. There is no precedent or basis for limiting "outrageousness" to physical action and no one has ever suggested a rationale for such a rule.[5]

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case in 200 years. Senate Select Committee to Study Law Enforcement Undercover Activities, 97th Cong., 2d Sess., *Hearings* 1044 (1982). Despite the absence of any law enforcement purpose, the bribes showered on almost all the Congressmen targets in ABSCAM involved asylum legislation—what Weinstein called the "investment/immigration problem scenario". *United States* v. *Kelly*, 539 F.Supp. 363, 366 (D.D.C. 1982). Exactly how this comports with the Attorney General's Guidelines—"that individuals and organizations should be free from law enforcement scrutiny that is undertaken . . . without a valid law enforcement purpose" (Select Committee Final Report 504)—has never been explained.

[4] As far as counsel are advised, no enticement case meeting this standard has ever surfaced.

[5] The vagueness of the rule is evidenced by the facts of this case. Jenrette had martinis prior to the bribe offer—physical? Worse

5. *The due process considerations outlined above and requiring review by this Court apply with special force in the context of our historic separation of powers—the very cornerstone of our Republic.* "It is by balancing each of these powers [legislative, executive, judicial] against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any freedom preserved in the Constitution." [6] "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." [7]

Thomas Jefferson brought the issue right down to the question before this Court in this case with these words: "it was part of the common law, adopted as law of this land, that [the people's] Representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive.[8] Here in offering bribes to members of Congress the executive sought to induce Congressmen to breach their public trust, precisely the interference with the "discharge of their functions," against which Jefferson warned. Moreover, as this Court has made clear, the principal inspiration for the long struggle for legislative

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yet, he believed he was being threatened with "cement" which he interpreted to mean being dropped into the Potomac River—physical? Apparently, for unexplained reasons, only a beating over the head by the con man or the federal agent would meet the "physical" standard of the Court below.

[6] John Adams, letter to Richard Henry Lee, November 15, 1775; quoted by Benjamin F. Wright, "The Federalist on the Nature of Political Man," *Ethics*, January 1949, at 9.

[7] *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

[8] The Works of Thomas Jefferson 322 (Ford Ed. 1904).

independence and the American system of separation of powers was fear of "the instigation of criminal charges against critical or disfavored legislators by the executive" *United States* v. *Helstoski*, 442 U.S. 477, 492 (1979), and the speech, or debate clause is but "one manifestation of the practical security for ensuring the independence of the legislature." *United States* v. *Johnson*, 383 U.S. 169, 179 (1966). As the Third Circuit further explained in its decision applying this Court's *Helstoski* rulings, "the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence." *United States* v. *Helstoski II*, 635 F.2d 200, 205 (1980). Here the executive went beyond the threat of indictment to actual prosecution of a weak Congressman "taken" by a confidence man in its own employ. It is "the independence of the legislature," *United States* v. *Johnson, supra*, which the framers of our Constitution sought to assure that gives the "temptation-due process" issue new and dangerous meaning as applied to members of Congress.

Chief Judge Jack Weinstein recognized this very danger when asked to approve a "plea bargain" in which Congressman Frederick Richmond agreed to forfeit his seat in Congress. Judge Weinstein refused in these prescient words:

> "The possibility of the executive utilizing the threat of prosecution to force the resignation of a congressional representative involves potentially dangerous political consequences. It represents an opportunity for an assault on the composition and integrity of a coordinate branch of government. Taken together, investigative techniques such as those used in the Abscam cases, United States v. Myers, 688 F.2d 817 (2d Cir. 1982), the enormous spectrum of criminal laws that can be violated,[9]

[9] Judge Weinstein might have mentioned at this point the ever-present need of congressional candidates for campaign funds and the likelihood that the next "Congress-temptation" series of cases

> the powerful investigative and prosecutorial machine available to the executive, and forced resignations through plea bargaining would provide an intolerable threat to a free and independent Congress." *United States* v. *Richmond*, 550 F.Supp. 605, 608 (E.D.N.Y. 1982).

How much more "an intolerable threat to a free and independent Congress" is sending confidence men to seduce members of Congress with bribes without probable cause or suspicion of any kind and the prosecution or threat of prosecution against those who take the bait.

6. *If the law is to permit non-physical actions by con men or federal agents no matter how outrageous, all at the risk of evisceration of the separation of powers on which our nation has grown great, so far-reaching a result should come from this Court, not from unguided lower courts.* It should come, too, in a case involving the inducement of members of Congress, not by extrapolation from decisions relating to drug pushers. Finally, involving as it does members of the legislature at the highest level, it should come from the highest court in the land.

The ABSCAM courts have themselves recognized the absence of an adequate standard. Several such courts have complained of the "elusive" quality of the standard to be applied in determining whether due process has been violated by the tempting of members of Congress. *United States* v. *Jannotti*, 673 F.2d 578, 606 (3rd Cir. 1982); *United States* v. *Williams*, 705 F.2d 603 (2d Cir. 1983); *United States* v. *Kelly*, 539 F. Supp. 363 (D.D.C. 1982). The Court of Appeals for the D.C. Circuit re-

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will involve bribery for acceptance of campaign contributions with all the vagueness accompanying such transactions. As Justice White has stated, "It will be the rare Congressman who never accepts campaign contributions from persons or interests whose views he has supported or will support. . . ." With "an Executive prone to fish in legislative waters . . . the possibilities are indeed endless, as is the potential for abuse." *United States v. Brewster*, 408 U.S. 501, 558, 560 (1972) (dissenting opinion).

versed in *Kelly*, but was unable to provide a satisfactory standard, "elusive" or otherwise. 707 F.2d at 1470. Judges Ginsburg and Robinson, concurring there, made a special appeal for guidance from this Court:

> "Without further Supreme Court elaboration, we have no guide to a more dynamic definition of the outrageousness concept, and no warrant, as lower court judges, to devise such a definition in advance of any signal to do so from higher authority." 707 F.2d at 1476.

And in this very case the trial judge complained that he was "without any guidelines since this issue directly relates to the issue of fundamental fairness, and due process" (65a).

The uncertainty thus expressed by various appellate and district courts concerning the proper limits of the "outrageousness/due process" defense cries out for guidance from this Court on the "elusive" standard today governing this important constitutional issue. The due process defense recognized by this Court in *Russell* and *Hampton*, requires definition, especially in the ABSCAM area, else it will be rendered wholly meaningless just where it is most needed.

7. *We submit, most respectfully, that this Court has a duty to delineate the limits beyond which con men and FBI agents may not go in the temptation of members of Congress.* The rule today, if it can be called a rule, has to be extrapolated from a number of lower court decisions in ABSCAM cases which in turn was extrapolated from decisions in the far different field of narcotics pushing.[10]

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[10] Even in narcotics cases which do not involve the vital separation of powers concerns here at issue, a number of state courts have reversed convictions because of "outrageous" police conduct that did not involve "coercion, violence, or brutality to the person." *State* v. *Glosson*, 441 S.2d 1178 (Fla. 1983); *State* v. *Talbot*, 71 N.J. 160 (N.J. 1976); *People* v. *Isaacson*, 406 N.Y.S. 2d 714 (N.Y. 1978); *State* v. *Metcalf*, 396 N.E.2d 786 (Ohio 1977).

The dangers to the doctrine of separation of powers which lies at the very heart of our constitutional system is clear. The line between temptation and framing is delicate; one person's ideas of temptation may be another's framing. Furthermore, "Secret police powers exercised honorably by today's high-minded officials can readily be tomorrow's abuses in the hands of less scrupulous administrators." [11] Before the nation risks those dangers and charts a new course for government away from our historic separation of powers, the Court entrusted by the Constitution with its final interpretation should give full consideration to those dangers. As lawyers who have long labored in the constitutional fields of civil freedom, we believe it is our duty to call those dangers to this Court's attention with the most urgent plea that this case be reviewed.

CONCLUSION

For the foregoing reasons, it is most respectfully submitted that the writ should be granted.

Respectfully submitted,

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[11] Select Committee Final Report 33.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2281

UNITED STATES OF AMERICA

v.

JOHN W. JENRETTE,

Appellant

Appeal from the United States District Court
for the District of Columbia
(D.C. Criminal Action No. 80-00289-01)

Argued May 23, 1984

Decided September 18, 1984

Kenneth M. Robinson and *W. Gary Kohlman*, with whom *Dennis M. Hart* and *Stanley Brand* were on the brief, for appellant.

Michael W. Farrell, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, and *Reid H. Weingarten*, Attorney, U.S. Department of Justice, were on the brief, for appellee.

Before WRIGHT, TAMM, and STARR, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: Former Congressman John Jenrette appeals his conviction on bribery charges stemming from the undercover operation by the Federal Bureau of

Investigation (FBI) known as "Abscam." Jenrette contends that 1) the trial court erred in declining to instruct the jury on the defense of duress; 2) the evidence adduced at trial established entrapment as a matter of law; 3) the FBI's conduct during the investigation violated principles of due process; and 4) the government failed to disclose certain evidence required by *Brady v. Maryland*, 373 U.S. 83 (1963). For the reasons expressed below, we affirm the conviction.

I. Background

This court is by now quite familiar with the FBI's undercover operation known as Abscam. *See United States v. Weisz*, 718 F.2d 413, 416-17 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1285, 1305 (1984); *United States v. Kelly*, 707 F.2d 1460, 1461-63 (D.C. Cir.), *cert. denied*, 104 S. Ct. 264 (1983). The Abscam operation involved a fictitious, FBI-created entity, Abdul Enterprises, which was purportedly operated by wealthy Arabs interested in United States investments. During the period relevant to this case, FBI agent Anthony Amoroso assumed the role of president of the organization, and Melvin Weinberg posed as its financial advisor.[1] Through various "middlemen," Weinberg and Amoroso offered bribes to members of Congress. In return, the Abscam operatives asked the congressmen to introduce private legislation that would permit their Arab clients to immigrate to the United States.

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[1] Weinberg was convicted of fraud in 1977. In return for his agreement to cooperate with the FBI in setting up the Abscam operation, Weinberg received a sentence of three years' probation. The Abscam operation was similar to "sting" operations that Weinberg had run in the past. United States v. Jenrette, Cr. No. 80-289, slip op. at 2-3 (D.D.C. July 30, 1983), Joint Appendix (J.A.) volume I (I) at 19, 21-22. *See also* United States v. Myers, 692 F.2d 823, 829 (2d Cir. 1982); United States v. Jannotti, 673 F.2d 578, 581 n.2 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982).

Jenrette became involved in the Abscam operation through his friend and co-defendant John Stowe.[2] In November 1979, Weinberg told Stowe that his Arab clients were interested in discussing with Jenrette the possibility of a private immigration bill. Weinberg asked Stowe to determine whether Jenrette would introduce such a bill for $100,000. Trial Transcript (Tr.) (Amoroso), Joint Appendix (J.A.) volume II (II) at 227-28. On December 3, 1979, Stowe met with Weinberg and Amoroso to arrange a meeting with Jenrette.[3]

The events that resulted in Jenrette's indictment for bribery began on December 4-6, 1979. On December 4, Jenrette and Stowe met with Weinberg and Amoroso at a townhouse on W Street in Washington, D.C. During the meeting, Amoroso explained that his clients needed help immigrating to the United States. Transcript of Taped Meeting of Dec. 4, 1979. J.A. volume III (III) at 737-43. Jenrette stated that he would introduce or arrange to have introduced a private immigration bill.

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[2] The evidence adduced at trial indicates that Stowe had numerous contacts with Weinberg for over a year before Jenrette became involved in the Abscam operation. Stowe was evidently interested in obtaining financing from Weinberg for various business deals. In a conversation with Weinberg in October 1978, Stowe mentioned that he had a friend who was a congressman and stated: "He's a[s] big a crook as I am . . . ." Transcript of Telephone Call on or about 10/17/78, J.A. volume III (III) at 919. Thereafter, hoping to make contact with Jenrette, Weinberg pursued Stowe with promises that his Arab clients might be willing to invest in Stowe's business.

[3] At the December 3 meeting, Stowe indicated that Jenrette was ready to handle the immigration problem but that Jenrette did not know the details of the arrangement. Trial Transcript (Tr.) (Amoroso), J.A. volume II (II) at 229. Amoroso told Stowe to explain the arrangement to Jenrette and find out whether Jenrette would agree to meet. *Id.* at 229-30. Stowe indicated that he understood Jenrette was to receive $50,000 up front and $50,000 when the bill was introduced. *Id.* at 230. The following day Stowe called Weinberg to confirm the meeting. Transcript of Telephone Call of Dec. 4, 1979, J.A. III at 710-14.

Id. at 744. Amoroso then told Jenrette: "We're talking about fifty thousand dollars now and fifty thousand dollars when this thing is introduced." *Id.* at 747. After some discussion about simultaneously introducing a bill in the Senate, Jenrette indicated that he would like to review the immigration laws before accepting the money. *Id.* at 759. Jenrette explained that he didn't want to take the money without "feeling comfortable about being able to do it." *Id.* at 760. Although Amoroso again offered Jenrette the money during the December 4 meeting, Jenrette postponed his response until the following day when he would know whether he could help Amoroso's clients. *Id.* at 766-70. Jenrette then assured Amoroso: "[D]on't get me wrong . . . I got larceny in my blood. I'd take it in a . . . minute." *Id.* at 772.

Jenrette phoned Amoroso the following day and stated that he would go forward with the transaction but probably could not arrange a meeting that day. Transcript of Telephone Call of Dec. 5, 1979. J.A. III at 788-89. On December 6, Jenrette informed Amoroso by telephone that he wanted Stowe to pick up the money. Jenrette explained that if Stowe received the money, he (Jenrette) would be "a little bit . . . away from a section in the code about . . . public officials." Transcript of Telephone Call of Dec. 6, 1979, J.A. III at 799. Amoroso agreed to give the money to Stowe. *Id.* at 800. After Stowe picked up the money, Jenrette confirmed with Amoroso receipt of the $50,000. Transcript of Telephone Call of Dec. 6, 1979, J.A. III at 806-07.

On January 7, 1980, Jenrette and Stowe again met with Amoroso and Weinberg. At this meeting, Jenrette brought up the immigration problem and indicated that he might be able to get Senator Strom Thurmond interested in the deal. Transcript of Meeting of Jan. 7, 1980, J.A. III at 852-53. Jenrette and Stowe continued to have contact with the Abscam agents regarding the proposed

bribery of Senator Thurmond until their arrest on February 2, 1980.[4]

On June 13, 1980, Jenrette and Stowe were indicted on one count of conspiracy to commit bribery and two counts of bribery. After a full trial, a jury found Jenrette and Stowe guilty on all counts. Both Stowe and Jenrette filed motions seeking a judgment of acquittal on the ground that the government's investigation was so outrageous as to offend due process, and that the evidence established entrapment as a matter of law. Alternatively, Jenrette and Stowe sought a new trial on the ground that the government failed to comply with the disclosure requirement of *Brady v. Maryland*, 373 U.S. 83 (1963). After a lengthy post-trial hearing, United States District Judge John Garrett Penn denied the motions. *United States v. Jenrette*, Cr. No. 80-289 (D.D.C. Aug. 4, 1983), J.A. volume I (I) at 83-84. Subsequently, Jenrette was sentenced to two years' imprisonment and fined $30,000.

Jenrette appeals his conviction and the denial of his motion for acquittal or retrial. In addition to the three claims raised in his motion before the district court, Jenrette asserts that the district judge erred in refusing to instruct the jury on the defense of duress. For the reasons set forth below, we find Jenrette's contentions meritless. Accordingly, we affirm the conviction and the district court's judgment.

II. ANALYSIS

A. *Duress*

The defense of duress excuses criminal conduct only where the defendant committed the illegal action "under an unlawful threat of imminent death or serious bodily injury . . . ." *United States v. Bailey*, 444 U.S. 394,

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[4] *See* Transcript of Telephone Call of Jan. 25, 1980, J.A. III at 983-84; Transcript of Telephone Call of Jan. 25, 1980, J.A. III at 989; Transcript of Telephone Call of Jan. 26, 1980, J.A. III at 993-94.

409 (1980). If the defendant had any reasonable, legal alternative to committing the crime, the defense of duress will not obtain. *Id.* at 410. In most cases, a defendant need not produce strong evidence to obtain a jury instruction on duress. Where, however, the evidence is insufficient as a matter of law to support a finding of duress, the district court's refusal to instruct the jury on duress is not erroneous. *United States v. Shapiro*, 669 F.2d 593, 596-97 (9th Cir. 1982). *See United States v. Peltier*, 693 F.2d 96, 98 (9th Cir. 1982) (per curiam). *See also United States v. Bailey*, 444 U.S. at 412.

Jenrette contends that he accepted the bribe only because he feared death or injury at the hands of Weinberg and Amoroso. According to Jenrette, Weinberg and Amoroso deliberately portrayed themselves as mobsters. Jenrette maintains that because he suffers from paranoia induced by alcoholism, this "gangster image" induced a reasonable fear of imminent danger. Jenrette testified that his fears were substantiated by a threat from Weinberg.[5]

We conclude that the evidence offered by Jenrette is insufficient as a matter of law to justify a finding of duress. Assuming that Jenrette reasonably believed Weinberg and Amoroso were gangsters and that this belief produced a reasonable fear, we still find no evidence that Jenrette was threatened with imminent bodily harm on December 6 when he accepted the bribe. Similarly, Jenrette cites no evidence in the record that a threat of imminent harm at the January 7 meeting caused him to suggest involving Senator Thurmond in

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[5] The "threat" Jenrette refers to consists of a statement made by Weinberg to John Stowe, Jenrette's co-defendant, during a phone conversation on December 4, 1979. The transcript reveals that Weinberg said: "[Y]ou gotta remember one thing now Tony [Amoroso] is a tough guy. He's [Jenrette] gotta . . . tell us he's gonna do it." J.A. III at 712.

the immigration deal.[6] Furthermore, Jenrette does not argue that he had no reasonable, legal alternative to accepting the bribe money. As noted, the bribe was first offered at the December 4, 1979 meeting. Although Jenrette allegedly feared for his life, he did not accept the money on December 4. Instead, he left the townhouse and made arrangements for an intermediary to collect the money two days later. Even if Jenrette reasonably believed he was in imminent danger while at the townhouse, he has offered no explanation for his failure to take alternative action, such as notifying law enforcement officials, during the next two days.

Jenrette's actions belie his assertion that he acted under threat of imminent harm and that he had no alternative but to accept the bribe. Accordingly, we find, as a matter of law, that the cited evidence cannot support acquittal on the basis of duress. The district court, therefore, did not err in declining to instruct the jury on the defense of duress. *See United States v. Shapiro*, 669 F.2d at 596-97.

B. *Entrapment*

Entrapment occurs when a defendant commits a crime not due to any predisposition, but solely as a result of

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[6] A defendant must show some threat of imminent harm to establish duress. A threat of future harm, or a threat made before the commission of the illegal act generally is not sufficient. *See* 1 Wharton's Criminal Law § 51 at 242-43 (C. Torcia 14th ed. 1978); United States v. Atencio, 586 F.2d 744, 746 (9th Cir. 1978) (immediacy is a crucial element of the duress defense). If the threat is not of immediate harm, there generally will be ample opportunity to avoid the illegal act. The only act or statement in the record that could even remotely be construed as a threat against Jenrette was made over the telephone before the December 4 meeting to a third person. *See* note 5 *supra*. Additionally, Jenrette testified that he received an unrecorded, threatening phone call sometime after Jan. 1, 1980 but *before* the Jan. 7, 1980 meeting. Trial Tr. (Jenrette) vol. XVI at 3415-17. Neither threat, however, was sufficiently immediate to justify the defense of duress.

government inducement. *See United States v. Russell*, 411 U.S. 423, 428-29 (1973). A defendant raises the issue of entrapment by producing evidence of government inducement. *United States v. Burkley*, 591 F.2d 903, 911-16 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979). Once the defendant properly raises the defense, the prosecution bears the burden of disproving entrapment by showing beyond a reasonable doubt that the defendant was predisposed to commit the crime. *Id.* at 915-16. Jenrette contends that the government failed to sustain its burden to prove predisposition. Consequently, Jenrette argues that, as a matter of law, the defense of entrapment bars his conviction.

We note at the outset that the scope of our review is limited. At trial, the issue of entrapment was submitted to and rejected by the jury.[7] We may overturn the jury's rejection of the entrapment defense only if no reasonable jury could have found that the government proved predisposition beyond a reasonable doubt based on the evidence produced at trial. *See United States v. Jannotti*, 673 F.2d 578, 599 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982). After reviewing the record in this case, we conclude that there was ample evidence to support the jury's verdict.

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[7] The district judge instructed the jury on both inducement and predisposition. The jury was instructed to consider first whether the evidence showed government conduct that could cause an undisposed person to commit a crime. If the jury found inducement, then it was instructed to determine whether Jenrette was in fact predisposed to take the bribe. Trial Tr. vol. XXII at 4748-50. By finding Jenrette guilty, the jury necessarily rejected the entrapment defense. We do not know, however, whether this defense was rejected because the jury did not find government inducement or because the jury concluded Jenrette was predisposed. The district judge, in his opinion denying Jenrette's motion for acquittal or for a new trial, concluded that there was sufficient evidence to support a finding of inducement. *Jenrette*, slip op. at 26, J.A. I at 45. In addressing Jenrette's entrapment argument, therefore, we will assume that inducement existed.

A defendant is predisposed if he exhibits a " 'state of mind which readily responds to the opportunity furnished by the [government] to commit [the crime] . . . .' " *United States v. Burkley*, 591 F.2d at 916 (quoting *Hansford v. United States*, 303 F.2d 219, 222 (1962) (en banc)). Predisposition may be proved by showing that the defendant "responded affirmatively to less than compelling inducement . . . ." *Id.* at 916. Here, the videotape of the December 4 meeting and the taped phone conversation of December 5 and 6 demonstrate that Jenrette readily responded to the government's bribe. Jenrette's statements during the meeting indicate that he was well aware that the Abscam agents were offering a bribe and that accepting the bribe was illegal.[8] Although Jenrette refused to take the money on December 4, his assurances that he had "larceny in [his] blood" and his suggestion that a third person receive the money indicate that his refusal did not stem from an unwillingness to accept a bribe. Rather, Jenrette's own statements suggest that he refused the money only because he was concerned about his ability to perform his end of the bargain and because he wished to formally insulate himself from illegal activities. After accepting the bribe on December 6, Jenrette further exhibited a willingness to commit illegal acts by suggesting the possibility of bribing another government official. In light of this evidence, we cannot say that no reasonable jury

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[8] After discussing the immigration problems and indicating that he would like to study the immigration laws before accepting the money, Jenrette stated: "I don't know that I've taken a bribe and I [don't know] that . . . you've offered me a bribe." Transcript of Meeting of Dec. 4, 1979, J.A. III at 764. At one point during the meeting, Jenrette suggested that the money be paid to his lawyer. "[I]f I take it I'm gonna . . . have a lawyer take it. . . . That's why I guess I'm hedgin[g] for a few hours. To get him here just to further cover [me] . . . that he's takin[g] it as a legal fee . . . ." *Id.* at 760-61.

could have found that Jenrette was predisposed to commit the crime.[9]

Jenrette argues, however, that the nature and scope of the government's inducement effectively negates this evidence of predisposition.[10] First, Jenrette contends that the government made several unsuccessful attempts to engage him in illegal conduct prior to the December 4 meeting. Second, Jenrette argues that after he refused the bribe on December 4, he was threatened by Amoroso and Weinberg until he accepted the bribe on December 6. Finally, Jenrette contends that the amount of the bribe was so excessive, especially in light of his financial and psychological condition, as to constitute compelling inducement sufficient to overcome the government's evidence of predisposition.

We are again mindful that we may overturn the jury's finding of predisposition only if no reasonable jury could have made such a finding in light of the evidence. The

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[9] In rejecting Jenrette's post-trial argument that the government's failure to reveal certain evidence prejudiced this entrapment defense, the district judge noted: "it seems unlikely that any jury can seriously consider the defense of entrapment when they actually see the crime committed." *Jenrette*, slip op. at 54-55, J.A. I at 73-74. Jenrette argues that the district judge effectively concluded that video-tape evidence of a crime conclusively establishes predisposition. We do not, however, read the district court's ruling so narrowly. Rather, we believe a fair reading of the district judge's opinion reveals he concluded only that the specific undisclosed evidence Jenrette sought was not strong enough in this case to overcome the evidence of predisposition established by the taped meeting of December 4 and phone conversations of December 5 and 6.

[10] The government's actions toward the defendant can be relevant evidence in determining whether the government met its burden of proving predisposition. United States v. Burkley, 591 F.2d at 915-16. Where, for example, the government employed substantial pressure, or threats, the defendant's agreement to commit an illegal act may not be sufficient by itself to show predisposition. *Id.* at 916. Indeed, evidence of severe government coercion may be used by the defendant to rebut the government's evidence of predisposition. *Id.*

evidence adduced at trial does not conclusively establish that Jenrette was subjected to persistent attempted inducements.[11] Similarly, the transcripts of the recorded telephone conversations of December 5 and 6 contain no evidence that Weinberg or Amoroso employed threats to assure Jenrette's acceptance of the bribe. Transcripts of telephone conversations of Dec. 5 & 6, 1979, J.A. III at 779-824. We find this evidence insufficient to warrant overturning the jury's verdict.

Similarly, we must reject the claim that the amount of money offered as a bribe in and of itself shows a lack of predisposition. We need not determine here whether a promised monetary reward can ever be so substantial as to establish a lack of predisposition. We conclude only that under the circumstances of this case, the amount of the bribe was not so excessive as to mandate a finding that no reasonable jury could have found predisposition.

In sum, we find sufficient evidence to support the jury's rejection of the entrapment defense. Accordingly, we reject Jenrette's assertion that the evidence at trial establishd entrapment as a matter of law.

C. *Due Process*

Jenrette further contends that the FBI's Abscam investigation, as directed toward him, was so outrageous that principles of due process bar his conviction. In *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 104 S. Ct. 264 (1983), this court rejected a similar claim that the government's conduct of the Abscam investigation violated fundamental fairness.[12] The panel

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[11] Jenrette testified at trial that in 1978 Stowe spoke to him about a scheme for importing certificates of deposit. Jenrette testified that he wanted nothing to do with the scheme. Trial Tr. (Jenrette) vol. XV at 3278. This single incident, however, cannot establish a pattern of attempted inducements by the government.

[12] In United States v. Kelly, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 104 S. Ct. 264 (1983), the defendants claimed that the Abscam

concluded that the due process clause bars a conviction only in the "rare instance of '[p]olice overinvolvement in crime' that reaches 'a demonstrable level of outrageousness.'" *Id.* at 1476 (quoting *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring)). The *Kelly* panel determined that such a level of outrageousness is not established by showing "obnoxious behavior or even flagrant misconduct on the part of the police[.]" *Id.* at 1476. Rather, due process guarantees are violated only in the narrow category of cases where the challenged conduct includes "coercion, violence, or brutality to the person." *Id.* (quoting *Irvine v. California*, 347 U.S. 128, 133 (1954)). Since the FBI's conduct toward Kelly did not involve "the infliction of pain or physical or psychological coercion," no due process violation existed. *Id.* at 1477.

Jenrette argues that *Kelly* is not dispositive of this case because the FBI's conduct toward him differed from that employed in the Kelly investigation. Specifically, Jenrette contends that the FBI "targeted" him with no "reasonable suspicion" that an investigation would reveal criminal behavior. In addition, Jenrette claims that the FBI failed to record certain phone calls that were critical to his defense.

Contrary to Jenrette's assertion, claims of this kind were indeed raised in *Kelly*.[13] Even if we assume Jen-

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investigation was fundamentally unfair. Among the facts noted by this court concerning the manner in which the Kelly investigation was conducted were: 1) it was largely controlled by Weinberg, a convicted swindler; 2) inducements were offered to persons who were not suspected of previous wrongdoing; 3) decisions to offer inducements were based largely on the unverified word of various non-FBI middlemen; 4) there was little or no FBI supervision of the Abscam actors; 5) some of the conversations between Weinberg and the various defendants were unrecorded; and 6) bribes were offered more than once. *Id.* at 1471-73, 1474 & n.1, 1475 n.6.

[13] The defendants in *Kelly* claimed that the FBI violated due process by proceeding with the investigation despite a lack of rea-

rette has compiled more complete and detailed evidence of misconduct than was compiled in *Kelly*, we must still reject Jenrette's due process defense. The character and not the amount of the alleged misconduct is determinative in assessing the fundamental fairness of the investigation. Because none of these claimed instances of misconduct involve the type of coercion, violence, or brutality described in *Kelly*, they do not rise to the level of a due process violation. We therefore affirm the district court's conclusion that principles of due process do not bar Jenrette's conviction.

D. *The* Brady *Claim*

Finally, Jenrette contends that the district court erred in denying his motion for a new trial based on the government's failure to comply with the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* mandates that upon request the prosecution disclose any evidence favorable to an accused where that evidence is material either to guilt or to punishment. *Id.* at 87.

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sonable suspicion of wrongdoing and by failing to record all phone conversations. In concluding that the Abscam operators' investigation of Kelly did not violate principles of fundamental fairness, the court necessarily rejected the argument that lack of suspicion and failure to record constitute due process violations. Subsequent to our decision in *Kelly*, we ruled in yet another Abscam case that the failure to record certain telephone conversations did not violate principles of fundamental fairness. United States v. Weisz, 718 F.2d 413, 435-37 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1285, 1305 (1984).

At least two other courts of appeal have considered and rejected the contention that the government must have a reasonable suspicion of wrongdoing before offering a bribe to a public official. *See* United States v. Myers, 692 F.2d 823, 835 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 2437-38 (1983); United States v. Jannotti, 673 F.2d 578, 608-09 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982).

In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court clarified the materiality aspect of *Brady's* disclosure requirement. Where a defendant has made a request for *specific* information that is not disclosed, that information is considered material if it *might* have affected the outcome of the trial. *Id.* at 104. Where the defendant has made no request or a general request for exculpatory evidence, the undisclosed evidence is material only if, in the context of the entire record, it creates a reasonable doubt as to the defendant's guilt. *Id.* at 112-13. There is some disagreement as to whether Jenrette specifically requested all the undisclosed information. We need not resolve this question, however, because a new trial is not warranted under either standard.

After a lengthy hearing and after examination of voluminous records and materials, the district court concluded that if the government had disclosed the alleged *Brady* information, the outcome of the trial would not have changed. *United States v. Jenrette*, Cr. No. 80-289, slip op. at 55 (D.D.C. July 30, 1983); J.A. I at 74. The district judge is, of course, best suited to evaluate the significance of the undisclosed material. His judgment accordingly deserves great deference. *See United States v. Provenzano*, 615 F.2d 37, 49 (2d Cir.), *cert. denied*, 446 U.S. 953 (1980). We thus will not overturn the district court's judgment absent convincing evidence that the undisclosed information would have affected the outcome of the trial. After examining the *Brady* material, we find ample support for the district court's ruling.

First, Jenrette contends that the government failed to disclose evidence indicating that he was "targeted" by the FBI. The undisclosed evidence includes: 1) statements by Weinberg and an FBI agent that the FBI wanted to "get" Jenrette; 2) statements indicating that Abscam operatives knew Jenrette was under investigation in South Carolina; 3) a May 8, 1979 teletype from the South Carolina FBI office advising Abscam opera-

tives that Jenrette was a close associate of two Abscam subjects; and 4) a May 1979 teletype recommending a bonus in part for Weinberg's discovery that Jenrette was in financial trouble and willing "to do favors." Jenrette maintains that this evidence implies a lack of predisposition and thus supports his entrapment defense.

Evidence of Jenrette's resistance to persistent FBI inducements to involve him in unlawful conduct prior to the December 4, 1979 bribery could bear on the question of Jenrette's criminal predisposition. The cited undisclosed statements and teletypes, however, do not establish that the FBI offered any inducements prior to December 4, 1979 or that Jenrette resisted such offers. At most, the undisclosed information may indicate some FBI interest in Jenrette before November 1979 or that Weinberg had disclosed information designed to generate interest in Jenrette before that time. Because we do not believe the undisclosed evidence is relvant to the issue of Jenrette's predisposition, we find no error in the district court's determination that the nondisclosure of this evidence provided no basis for a new trial.[14]

The second category of undisclosed evidence concerns Weinberg's activities during the Abscam operation. Jenrette points to evidence that Weinberg was running a "double scam." Jenrette asserts that Weinberg would help create phony certificates of deposit, induce people to circulate the certificates, and then collect a bonus from the FBI for removing the certificates from circulation. Jenrette asserts that the FBI failed to disclose documents indicating that it knew of this scam and a teletype stating that the purpose of this scam was to provide a method for introducing undercover agents to politicians.

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[14] If anything, this undisclosed evidence bears on Jenrette's claim that the Abscam investigation violated due process. As noted, however, FBI conduct that does not inflict pain or physical or psychological coercion does not constitute a due process violation. *See* section II C *supra*.

This evidence pertains to the *conduct* of the Abscam investigation. The undisclosed documents are thus relevant to Jenrette's claim that flagrant misconduct during the investigation violated his right to due process. Because the false certificate scheme does not amount to "physical or psychological coercion," the undisclosed evidence regarding the scheme could not have established a due process violation. *See United States v. Kelly*, 707 F.2d at 1477. Since disclosure of this evidence could not have affected the outcome of Jenrette's trial, we find no error in the district court's determination that a new trial was not warranted.

The third category of undisclosed evidence concerns the Abscam operatives' failure to record all telephone conversations with Jenrette and Stowe. Two Abscam prosecutors testified at the post-trial hearing that they discerned a pattern of unreported phone conversation notwithstanding instructions that all conversations were to be recorded. *See, e.g.*, Transcript of Due Process Hearing of May 12, 1981 at 202. Again, this evidence concerns the fundamental fairness of the investigation and is thus relevant to Jenrette's due process claim. This court has already ruled in the context of other Abscam cases that the failure to record some phone conversations does not violate principles of due process. *United States v. Weisz*, 718 F.2d 413, 435-37 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1285, 1305 (1984); *see also United States v. Kelly*, 707 F.2d 1460, 1472-76 (D.C. Cir.), *cert. denied*, 104 S. Ct. 264 (1983). Since this information could not have affected Jenrette's conviction, its nondisclosure does not violate *Brady*.[15]

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[15] The FBI's failure to record phone conversations could be relevant to show the Abscam agents' lack of credibility. The trial testimony, however, clearly established that the Abscam operatives failed to record all phone conversations and even lost tapes of some conversations. *See, e.g.*, Trial Tr. vol. VIII at 1542-49 (Amoroso) and 1569-74 (Weinberg). Any evidence that two prosecutors, who were not even involved in Jenrette's case, concluded that in general

Fourth, the defense claims that the government failed to disclose the previously noted May 9, 1979 teletype reporting that Jenrette was in financial difficulty and a November 20, 1979 teletype indicating that Jenrette was involved in an obstruction of justice charge. According to Jenrette, these two teletypes prove his stressful condition and are thus relevant to the duress defense. These teletypes, however, fail to establish a serious threat to Jenrette's safety or that Jenrette had no legal alternative to accepting the bribe. This undisclosed evidence therefore could not support exoneration based on duress and thus does not warrant a new trial.

Finally, Jenrette argues that the government did not disclose certain evidence pertinent to Weinberg's credibility. This evidence consists of payments from the Miami FBI office to Weinberg, evidence that Weinberg kept gifts solicited for his fictitious Arab clients, and Weinberg's statement that if he didn't "coach" persons accepting bribes, there would be no case. Although such evidence could impugn Weinberg's character, his credibility could not be undermined more than it already had been by his sporadic memory, criminal background, and dubious motives. As the district court observed, "there seemed little to support the credibility of Weinberg. . . . [H]e had convenient lapses of memory, and he had a motive to lie. Moreover, his credibility was impeached by his background, a convicted con man, who stood to gain not only more money from Abscam depending upon how many government officials he could bring into the net, but some form of absolution from his probation requirements." *Jenrette*, slip op. at 53-54, J.A. I at 72-73. The district court concluded, and we agree, that the voluminous evidence introduced at trial so completely undermined Weinberg's credibility that any additional information concern-

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there were unrecorded phone conversations in the Abscam investigation would have been only cumulative and would not have affected the outcome of the trial.

ing payoffs or solicited gifts could not have affected the outcome of the trial.

In sum, we agree with the district court's conclusion that the undisclosed evidence would not have affected the outcome of the trial and thus does not meet the materiality requirement of *Brady*. We therefore see no basis to grant a new trial based on the government's alleged failure to disclose this information.

III. Conclusion

For the foregoing reasons, Jenrette's conviction and the district court's denial of his motion for acquittal or new trial are

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 80-289

UNITED STATES OF AMERICA

v.

JOHN W. JENRETTE,
JOHN R. STOWE

[Filed Aug. 4, 1983]

OPINION

Former Congressman John W. Jenrette[1] and John R. Stowe were convicted of conspiracy (18 U.S.C. § 371) and bribery and aiding and abetting (18 U.S.C. § 201 and § 2). The case is now before the Court on their separate motions for judgment of acquittal or, in the alternative, for a new trial. In support of their motions, the defendants contend that (1) the actions of the government were so outrageous so as to violate the constitutional due process rights guaranteed to every citizen, (2) that the evidence established that the defendants were victims of entrapment as a matter of law, (3) that the government failed to comply with the requirements of *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963), and that the government failed to comply with certain disclosure requirements imposed by the

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[1] Jenrette represented the Sixth Congressional District of South Carolina.

Court. Stowe also argues that the evidence as to Count Three charging him with bribery was insufficient as a matter to law. Not surprisingly, the motions are opposed by the government.

I

This case is one of the so-called Abscam cases in which several members of the United States House of Representatives,[2] one United States Senator[3] and other federal officials, state officials, lawyers and private citizens[4] were charged in different districts[5] with a variety of crimes including conspiracy, bribery, criminal gratuity (18 U.S.C. § 201(g)), interstate travel for unlawful activity (18 U.S.C. § 1952) and aiding and abetting (18 U.S.C. § 2).

There is no need for this Court to set out a detailed statement of the events leading up to Abscam since those facts are fully discussed in three other district court opinions. *See United States* v. *Kelly*, 539 F. Supp. 363 (D D.C. 1982), *reversed and remanded*, —— U.S. App. D.C. ——, 707 F.2d 1460 (1983); *United States* v. *Myers*, 527 F. Supp. 1206 (ED N.Y. 1981), *affirmed*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 2438 (1983); *United States* v. *Jannotti*, 501 F. Supp. 1183 (ED Pa. 1980), *affirmed*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982). Suffice it to say that Melvin Weinberg, a professional "con man" was convicted in the

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[2] Michael O. Myers, Raymond F. Lederer, Frank Thompson, Jr., John M. Murphy, Richard Kelly and John W. Jenrette.

[3] Harrison A. Williams, Jr.

[4] Lewis C. Johanson, Angelo Errichetti, Howard L. Criden, Joseph Silvestri, Eugene Robert Ciuzio, Stanley Weisz, Alexander Feinberg, George Katz, Alexander Andrew Alexandro, Kenneth N. McDonald, Charles T. Walsh, Martin Gabey, Vincent J. Cuti, Jr., Nicholas Barbato and Bowe, Walsh and Associates.

[5] Charges were brought in the District of Columbia, the Eastern District of New York and the Eastern District of Pennsylvania.

Western District of Pennsylvania on his plea of guilty to fraud in 1977. He received a sentence of probation based on his agreement to cooperate with the Federal Bureau of Investigation (FBI) in setting up an undercover operation similar to the London Investors Ltd. "business" that he had been successfully operating before his arrest and conviction in Pittsburgh, Pennsylvania. He had been an FBI informant since the 1960's although throughout that period he continued to operate a number of cons and schemes in order to bilk and cheat various persons and citizens out of their money and goods. When Weinberg agreed to undertake the undercover operation for the FBI, he did so, not out of any change of heart or desire to go legitimate or out of loyalty to the government or the FBI or because he had reformed, but in his own words to make some big money. *See United States* v. *Kelly, supra*, 539 F. Supp. at 365. At first he was used in an attempt to ferret out information on stolen art work and securities, primarily certificates of deposit, but finally it was decided to have Weinberg participate in a scam in which he was passed off as the representative of Arab sheiks who wanted to enter the country. This scenario was apparently based somewhat on the plight of the Shah of Iran, the idea being that the fictitious sheiks were required to flee their country because of internal problems. To protect themselves against problems they might have in immigrating to this country, the purported sheiks, through Weinberg, and Special Agent Anthony Amoroso, posing as the president of Abdul Enterprise and as a gangster type named Tony DeVito, were to attempt to sign up as many members of Congress and government officials as possible. The Congressmen were to be promised money and the possibility of investments in their home districts and they were to be approached through middle men.

Abscam started in the spring of 1978 when a fictitious organization named Abdul Enterprises, which purportedly represented Arabs interested in investing in the United

States, was formed by the FBI. Weinberg acted as the financial adviser to Abdul Enterprises, and as noted, Amoroso acted as its president. Sometime thereafter, Angelo Errichetti, then the Mayor of Camden, New Jersey, was brought into the Abscam web when it appeared that it would be necessary to bribe him in order to continue pursuing the possible illegal activities of other men. Errichetti and a Philadelphia attorney, Howard Criden, introduced the Abscam undercover agents to Congressman Michael Myers and it was there that Abscam had its true beginning. It is unnecessary for the Court to discuss the background of Abscam any further. In this case, the approach to Jenrette, was made through John Stowe, the former Congressman's friend. Stowe had apparently made his first contact with Weinberg sometime in 1978 when he and Weinberg discussed the possibility of investments in securities and how those securities could be brought into the United States. Weinberg's contacts with Stowe, and thereafter his contacts with Jenrette, followed the scenario created for Abscam.

II

The first recorded conversation between Stowe and Weinberg took place on or about October 17, 1978. That tape is incomplete but Stowe and Weinberg briefly discussed a "business" deal during which Stowe indicated that he, Stowe, was having some difficulty and stated "as I told you my contact is a Congressman."[6] (Q 379). At

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[6] The reference to Q 379 refers to the number assigned to the tape on which the particular conversation was recorded. Any reference to the number of the tape followed by a hyphen and then a further number, for example, Q 379-2, refers to the page of the typed transcript of the recorded conversation taken from that particular date. The tapes were received in evidence, the transcripts were not. *See* District of Columbia Criminal Jury Instructions, (3rd ed. 1978), No. 2.29. The quoted portions of the transcripts are copied verbatim from the transcripts including any errors in spelling or otherwise contained therein.

one point in the conversation, Stowe mentions that he has had "a lot of dealings with my Congressman, whom I trust." Then, while laughing he stated: "He's as big a crook as I am (laughing) but, ah, no, I'm, ah I don't know who his contact is." In a second recorded conversation on October 19 or 20, 1978, it becomes clear that Weinberg and Stowe were referring to securities and bringing securities to the United States.

The next significant recorded conversation between Stowe and Weinberg [7] took place on April 18, 1979. It is clear from the tape that the entire conversation was not recorded since the first statement contained on the tape is Weinberg's question to Stowe, "A, will you have Jenrette call me alright?" In this conversation, Stowe and Weinberg were discussing a plant which makes detonators which had been out of business since the end of the Viet Nam war. (Q 381). The plant had the name of American Gear & Pinion, and throughout the months of conversation which followed between Stowe and Weinberg, and thereafter between Stowe and Amoroso, Stowe would continue to seek financing so that he might invest in or purchase the plant and manufacture, at first detonators to sell to foreign countries, and later, gambling equipment which might be used in the newest market for such equipment on the east coast, Atlantic City.

It then became painfully obvious that Weinberg achieved what he sought from Stowe. First, he had Stowe believing that Weinberg's Arab friends might be interested in investing in American Gear & Pinion with the

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[7] This Court is not confident that all conversations between Stowe and Weinberg, and indeed the other participants in the Abscam operation as it related to Jenrette and Stowe, were recorded, or that all portions of conversations were recorded. Moreover, as will be discussed later, there was no uniform procedure followed by the FBI for debriefing Weinberg, and the other participants, or to insure that Weinberg did not go off on his own "con" while seeking to con certain middle men at the request of the FBI in an effort to reach congressmen.

possible result of a significant financial yield to Stowe. This was the carrot held in front of Stowe's nose throughout the remainder of the telephone calls between them and to the time that Abscam became public. Second, Weinberg believed that Stowe had a contact with a Congressman for that district, namely Jenrette. Throughout the many telephone conversations which followed, while Stowe continued to pursue an interest in having Weinberg and his friends invest in American Gear & Pinion, Weinberg kept bringing up the subject of "the Congressman". It was quite obvious that Weinberg had no interest in Stowe; his primary interest was in attempting to make contact with Jenrette and to present Jenrette with the possibility of accepting a bribe. Third, Weinberg concluded that Jenrette would be an easy target because American Gear & Pinion was in Jenrette's home district and Stowe was Jenrette's friend. It's quite possible that he concluded that Jenrette would be interested in bringing jobs to his home district, making his own investment, and in assisting his friend Stowe. Moreover, Weinberg was later to learn as he pursued Stowe to bring Jenrette in on the deal, that Jenrette was having financial difficulties.

Subsequent to April 18, 1979, there were eight recorded telephone conversations between Stowe and Weinberg, and throughout those conversations it was obvious that Weinberg was not interested in Stowe or American Gear & Pinion. When Stowe spoke with Weinberg on April 20, 1979, and attempted to interest him in American Gear & Pinion, Weinberg attempted to gain more information concerning Jenrette even though, assuming Weinberg was interested in American Gear & Pinion, there was no need for Jenrette to become involved. Stowe apparently never realized this. For example, on April 20, while Stowe talked about American Gear & Pinion, Weinberg went along and then, at the first opportunity asked, "all rightie. Now, did ya get 'ahold of the Congressman." (Q 382-3).

In the next recorded conversation [8] the first portion of the conversation was not recorded. Weinberg's first statement was 'ya and I like to meet with the Congressman up in, ah, his property's where, in Myrtle Beach?" It was at this point that Stowe protested and advised Weinberg that he wanted to take one thing at a time and he didn't "know whether I want him [Jenrette] to get involved in this or not." (Q 344-1) Weinberg at this point backed away apparently so as not to tip his hand and advised Stowe, "well, if he wants it fine, its up to you." (Q 344-1) Of course, as noted, it is quite obvious that the target of Weinberg's "investigation" was Jenrette.

After April 25, 1979, there were recorded conversations between Weinberg and Stowe on May 2, May 13 and two on July 11. Throughout, in these conversations, Stowe continued his attempts to focus on American Gear & Pinion while Weinberg continued to seek information or some connection to Jenrette. In each of the conversations, Stowe continued to refer to his request for financial assistance to acquire American Gear & Pinion while Weinberg, though ostensibly indicating interest in the financial venture, continued to ask questions about "the Congressman." In the conversation on May 2, 1979, one which was not fully recorded, Stowe's first words were "get in touch with that American Gear & Pinion". He then stated "no that's a pretty good deal, Mel. He's got the building, the machinery, the land and everything there and I know it was appraised for over a million and a quarter several years ago." (Q 345-1) Weinberg suggested that "the Congressman" call him. Finally, Stowe gave Weinberg the name of the Congressman—John Jenrette. (Q 345-(3-4)).

Near the end of the conversation, Weinberg stated that he would give the Congressman a call.

Weinberg called Stowe on May 13, 1979 and again Stowe sought to gain his interest in American Gear &

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[8] It should be noted that Stowe did not testify therefore it is not entirely clear whether all telephone conversations were recorded.

Pinion. Weinberg, seeking to continue Stowe on the string, and misleading him, stated that he was up at the plant "with my appraiser and take, stop and look at the plant." (Q 346-1) Later in the conversation Weinberg notes that he would also like to speak to Stowe about "the, on the ah, Congressman's land." (Q 346-21) At this point in the conversation, Weinberg refers for the first time to "Tony DeVito" the "new Chairman of the Board." (Q 346-2) Then he suggested to Stowe that "we will bring you and the Congressman down, all right, we'll send our plane, we'll fly you down commercial and we'll meet you on the yacht and we can go over everything." (Q 346-3).

In a recorded conversation on July 11, 1979, Stowe called Weinberg and advised that "everything's set up with the gentleman in Washington." (Q 347-1) At the end of the conversation, Weinberg stated, "and the Congressman's all set up huh?" (Q 347-4).

Weinberg, who views himself as a master con man, at one point testified that he thought Stowe was a con man or that Stowe was trying to con him. The tapes demonstrate that Stowe, rather than being a con man, was naive, and at times, somewhat pathetic. During a conversation with Weinberg on September 9, Weinberg stated that "we just not got enough help." (Q 383-2). Stowe immediately asked "how about a job Mel?" Weinberg, apparently taken by surprise, asked Stowe to repeat the question and Stowe, obviously dead serious asked, "how about a job?" Weinberg responded, "well, I'll tell ya, send me a resume, they are gonna be hiring soon." Stowe answered that he did not have any up-to-date resumes and Weinberg advised him to make one up and send it to him. Near the end of the conversation, Weinberg again brought up the Congressman noting "and maybe we could do something for him." (Q 383-7)

The next critical conversation between Weinberg and Stowe took place on November 15, 1979, *after* John Good,

the agent in charge, and Amoroso (usually referred to throughout as Tony DeVito) decided to propose a bribe to Jenrette. The Agent's call was made from a hotel suite in Atlantic City and was unrecorded, even though the call was made in the presence of FBI agents. The agent testified that they were afraid to bring recording devices into the hotel suite but records later uncovered by Jenrette's counsel during the trial revealed that at least one, rather expensive recording device, was in the room at about the time the call was made.[9] The conversations leading to the making of the call also raise a number of questions. Clearly the decision to offer a bribe to Jenrette was instigated and made by Weinberg, not John Good, agent in charge, or Anthony Amoroso, the agent assigned to work with Weinberg. *See* Part IV C, *infra.*

The next call was made on November 27, 1979, to set up a meeting with the Congressman; this call apparently being the result of the unrecorded conversation on November 15. Again, Stowe asked for a loan and Weinberg promised to "talk about it." (Q 384-3). Weinberg promised to introduce Stowe to Tony DeVito. He stated that he would bring "Mr. DeVito with me" and then cautioned Stowe "just to introduce ya to him so when ya come Tuesday with the, ah Congressman, don't look like ya just met him [DeVito]. Ya follow me?" (Q 384-4)[10]

On December 4, 1979, there was a partially recorded telephone conversation between Stowe and Weinberg. The purpose was to finalize the planned meeting between Stowe, Jenrette, DeVito and Weinberg at the Abscam

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[9] One must wonder why for such an important call, the agents did not make arrangements to record the call, or if the call could not be recorded from the hotel suite for the reasons stated by the agents, why the call was not made from another location on that day or another day. There appears to be nothing significant about November 15, 1979.

[10] Weinberg has been accused of putting words in the mouths of some of the Abscam participants.

townhouse located at 4407 W Street, N.W. in the District of Columbia. Weinberg briefly explained that they would like the Congressman to help them bring the Sheik and his friends into the country. Weinberg stressed to Stowe that DeVito "is" a "tough guy", "so this is what he wants but you gotta remember one thing now Tony's [DeVito] a tough guy. He's gotta his yaknom tell us he's [Jenrette] gonna do it." (Q 127-3) Stowe notes that he wants "no recordings or anything" and Weinberg assures him that the townhouse is safe. (& 127-3)[11]

The next recorded conversation was between Stowe, Jenrette, Weinberg and DeVito and took place at 4407 W Street, N.W. in Washington, D.C. and was recorded by video tape. (Q 132). It was during this meeting that DeVito offered a bribe to Jenrette in exchange for Jenrette using his official influence to assist a number of persons to enter the country. When DeVito asked what Jenrette could do for him, Jenrette stalled and sought time to study the situation, purportedly to be sure that he could do what he promised. Jenrette also noted his financial problems and sought financial assistance. [Q 132-17] They discussed how a payment to Jenrette could be made and Jenrette noted at one point that he wanted his law partner there at the house "just to further cover my ass." (Q 132-28). They also discussed the financing of Stowe's project (American Gear & Pinion) in South Carolina. (Q 132-29) Jenrette notes later on that "John's [Stowe] gonna probably be expecting, gonna be expecting something". (Q 132-30)[12]

It is clear that during the December 4 meeting Jenrette understood that he was being offered a bribe. He notes at one point that, "I dunno a thing. I don't know

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[11] At this point it seems obvious that Stowe realizes there may be a discussion about a criminal act.

[12] It appears that Jenrette is advising DeVito that Stowe would probably want a portion of any money paid to him.

that I've taken a bribe and I dunno know that that you've offered me a bribe." (Q 132-31) He immediately stated however that he would feel "more at comfort if I could come back tomorrow and say OK." (Q 132-31). In that meeting he advised the group that he was under investigation by the Justice Department and that Edward Bennett Williams was his attorney. He also stated later on, "ya, and I'd like to have your money. Don't get me wrong. I'd like to do it, I'd like to help you." (Q 132-34) As if to set aside any doubt as to his state of mind, Jenrette advised DeVito "are we clear, I mean I, well listen, don't get me wrong, I don't I— . . . I got larceny in my blood. I'd take it [the money] in a goddamn minute." (Q 132-39) Jenrette did not accept the bribe at that point but left the townhouse to think it over, the impression being that he wanted to make sure he could produce on his promise.

Stowe called the townhouse on December 5 and spoke with DeVito. He expressed the desire to start up to the townhouse at that time, presumably to pick up the money. However, DeVito stated, "Hey, listen for that kind of money we can all wait a little bit." (Q 143-1) DeVito's reluctance at that point resulted from the fact that Jenrette had not advised Stowe or DeVito that he would accept the money.

A few minutes thereafter, Jenrette called DeVito and advised him he was tied up and that he would stop by the townhouse after having dinner with the President and his family at the White House.[13] He then said that he would stop at the townhouse in the morning. DeVito rejected that suggestion and asked Jenrette to meet him after dinner. Jenrette indicated that he could not get there until after 10:00 and DeVito advised him that that

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[13] It isn't clear whether Jenrette actually had a dinner engagement or whether he was merely attempting to impress DeVito.

was agreeable.[14] (Q 144-2). Finally, DeVito relented and told Jenrette to come over that evening if possible, and if not possible, to come over the next morning.[15] During the conversation, Jenrette and DeVito discussed the possibility of Stowe receiving a share. Thereafter, Jenrette expressed some concern over his ability to perform on the agreement. DeVito noted that "like I told you last night. I'd have known if you were [misleading] me if you told me definitely it could be done." (Q 144-4).

Jenrette again expressed concern over being able to produce on his promise and the following colloquy occurred:

> Jenrette: All right, if I come, I'll do what I said. I mean that part will be done. I'll steer it, but now you guys come and and for the same reason I don't produce. I uh understand that you understand what I'm saying.
>
> DeVito: Right.
>
> Jenrette: But, are they going to? There I don't want.
>
> DeVito: Their problem is not with you, their problem is with me.
>
> Jenrette: All right, I don't want any, you know.

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[14] The jury in listening to the tape could certainly infer, taking into consideration Jenrette's comments at the townhouse on December 4 (Q 132), that Jenrette rather than having second thoughts about accepting any bribe, was really trying to find a way to have Stowe pick up the money. Naturally, DeVito was just as anxious to have Jenrette pick up the money in person in the open eye of the video camera.

[15] Obviously, DeVito's primary concern was to get Jenrette to accept the bribe, preferably on camera, thus by giving him the option of stopping by the townhouse that evening or the next morning, he felt it was likely that Jenrette would personally pick up the money.

DeVito: John, like I said.

Jenrette: I don't, I don't like cement.[16]

(Q 144-(4-5)). DeVito assured Jenrette that if Jenrette failed to perform, the problem would be DeVito's, not Jenrette's. (Q 144-5) It was finally agreed that DeVito would wait to hear further from Jenrette.

Yet later the same day, Stowe called DeVito and indicated that Jenrette had advised him that Stowe could pick him (Jenrette) up the next afternoon and that they would go to the townhouse. (Q 145-1) Stowe called DeVito the next morning to say that he was waiting for further instructions from Jenrette. (Q 155)

Finally, on the afternoon of December 6, Jenrette called DeVito and noted that Stowe was there in Jenrette's office with him. After indicating that it would be difficult for him to meet with DeVito, Jenrette asked whether Stowe could meet with DeVito. DeVito, obviously disturbed that he would not get Jenrette on camera, complained to Jenrette that he felt he (DeVito) was not trusted by Jenrette. (Q 156-3) Jenrette noted that he had an agreement with DeVito and that "I'm gonna fulfill my obligations." (Q 156-3)[17] Perhaps giving his true inten-

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[16] Presumably, Jenrette was saying that he wanted a clear understanding that he would do everything to perform on the agreement and that he did not want to end up in a river in cement if, regardless of his best efforts, he was unable to perform. Although the government does not admit it, it is clear that there was a deliberate attempt to depict DeVito as a member of organized crime. Weinberg had already told Stowe that "you gotta remember one thing now, Tony [DeVito] is a tough guy" which indicated that Jenrette was clearly to tell them whether he was going to do it, referring to arranging to bring the Sheik or his family into the country. (Q 127-3) Indeed this statement of Jenrette's purported fear of DeVito, was the basis for Jenrette's request for an instruction on duress and coercion. *See* District of Columbia Criminal Jury Instructions (3d ed. 1978) No. 5.04. That request was denied.

[17] Here Jenrette apparently refers to his obligation to assist the Sheik to enter the country.

tion away, Jenrette further stated "that keeps me just a little bit ah one step away from a section in the code about, uh, public officials." [18] He noted that "we've got those ethic rules about the amount ah money that we can make." (Q 156-3)

DeVito then stated that "you're looking for, uh, insulation, uh, ah . . . along that line, and you want him to pick up the money and whatnot (laugh). All right—what time's he gonna come over?" (Q 156-4) Jenrette noted that Stowe was sitting with him right then, and then announced that he was required to leave his office to go on the House floor and that Stowe would speak with DeVito while Jenrette was on the floor.[19] (156-5) Stowe and DeVito then made arrangements for Stowe to come down to the townhouse and pick up the money.

Stowe is thereafter recorded on a video tape accepting a $50,000 bribe on behalf of Jenrette (Q 158). When Weinberg asked Stowe "what is with that guy" referring to Jenrette's reluctance to come down to the townhouse, Stowe states that Jenrette is "scared", and that, "he'll do what he says, but he's gonna protect himself." (Q 158-2) Once the money is counted out and handed to Stowe, Stowe again mentions American Gear & Pinion. (Q 158-4) Weinberg promises that they will work out the terms of an agreement.

Later, after Stowe had returned to Jenrette's office with the money, Jenrette called DeVito and acknowledged during the conversation that Stowe was with him at that time. DeVito asked whether he had received "the package" from Stowe and Jenrette responded, "everything's fine. I'll do my share of the work and I'll need to do is

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[18] Apparently a reference to the United States Code.

[19] The fact that Jenrette was discussing the acceptance of a bribe at the same time he was performing his official functions in the Congress of the United States was probably not lost on the jury.

er the names and where and so I can start making some background preparations." (Q 156A-3)

Although the bribe had been given to Jenrette, the calls between Stowe and Weinberg did not cease. Stowe continued to prod Weinberg about financing for American Gear & Pinion. There are eight recorded conversations between Stowe and Weinberg between December 6, 1979 and January 7, 1980, during which Stowe continued to press the subject of the plant in South Carolina. On January 7, DeVito, Weinberg, Stowe and Jenrette again met at the townhouse and discussed financing for American Gear & Pinion. Again much of the conversation concerned that plant but during the course of the conversation Jenrette suggested that a United States Senator could probably be brought into contact with DeVito and Weinberg and that subject was discussed in several subsequent conversations. The last recorded conversation between the participants was on January 29, 1980. On February 2, 1980, the Abscam story broke and Stowe and Jenrette were arrested.

III

In moving for judgment of acquittal, or lieu thereof, a new trial, the defendants complain of violations of law allegedly perpetrated by the government prior to their indictment and during the trial. First they contend that the government violated their rights of fundamental fairness in general by the methods used by the Federal Bureau of Investigation (FBI), and in particular, by the manner in which they were selected and pursued by the FBI. They contend that the action by the government agents, and their paid con man, Weinberg, amounted to over involvement by the agents and that such conduct was outrageous. *See Hampton* v. *United States*, 425 U.S. 484, 493-494, 96 S.Ct. 1646, 1651-1652, 48 L.Ed.2d 113 (1976) (Powell, J. concurring); *United States* v. *Russell*, 411 U.S. 423, 93 S.Ct. 1637, 39 L.Ed. 2d 366 (1973); *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978);

United States v. *Archer*, 486 F.2d 670 (2d Cir. 1973). Second, they complain that there was entrapment as a matter of law in that they were induced to commit the offenses by government agents and that there was no predisposition to do so on their part. Third, they complain that the government failed to comply with disclosure requirements after their indictment, both pretrial and during the trial. Finally, Stowe complains that the evidence was insufficient as a matter of law to convict him of Count Three of the indictment in which he was charged with aiding and abetting Jenrette to bribe a senator.

Prior to considering the merits of the motions, some comment need be made as to the consideration of the motions undertaken by the Court. This Court has given careful consideration to the arguments made by the parties. The Court has reviewed, not only the voluminous transcript in this case, but at the request of the parties, the Court has reviewed and read portions of the transcripts in the cases of *United States* v. *Myers*, *supra*, tried in the Eastern District of New York, and *United States* v. *Jannotti*, *supra*, tried in the Eastern District of Pennsylvania. Those records were also made available to the parties. In addition, the Court has reviewed twenty-five volumes of Abscam files submitted by the government, *in camera*, pursuant to the Court's order. Those files included various interoffice memoranda, presumably prepared by the FBI in connection with this case, and other materials related to the case.[20] The Court also re-

[20] While, no doubt, it would have been more efficient and far better to have these materials made available to counsel for the defendants, the Court concluded that counsel were not entitled to the files. Moreover, most of the information contained therein is sensitive and none of it, other than that material which was turned over to the defendants, amounted to either Jencks material or Brady material. Some of the material might be harmful to innocent third persons not involved in the case and therefore cannot be released for general public consumption.

viewed, *in camera*, portions of files of related investigations, some which had no direct bearing in this case. Some of those files are related to Goldcon and other undercover investigations.[21] Additionally, the Court reviewed, *in camera*, Melvin Weinberg's informer file which was retained by the FBI.[22] Finally, the Court reviewed, *in camera*, various submissions made by the government over the period of the trial, and a few submissions made *in camera* by the defendants. The government submissions included not only memoranda containing factual information, but portions of the FBI manual relating to the handling of informants, the payment for such services, and the processing of information received from informants and the manner in which the FBI sought to monitor an informant's activity.

Several post trial hearings were held in this case, some in late 1980, and another in May 1981. Because of the nature of the material being submitted, the parties requested and received permission to hold the record in this case open until April 1982. The government submitted additional material in April. Subsequently, in January 1983, it came to the attention of the Court that a news service had published a story indicating that additional files had been released to that service pursuant to the Freedom of Information Act, 5 U.S.C. § 552. The short story concerning that release of information suggested

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[21] These files are reviewed as the result of testimony during the trial in this case which suggested a possible overlap in Abscam and Goldcon and certain other investigations conducted by the FBI during the same period.

[22] It was necessary to review this file to determine what instructions, if any, may have been given to Weinberg during the course of the FBI investigation. It was also necessary to review the file in an attempt to ascertain the exact amount of payments given and promised to Weinberg over the life of the Abscam investigation and further to determine whether any FBI 302 forms had been retained in that file. The file afforded little assistance to the Court.

that there might have been additional information concerning the FBI investigation of Jenrette's activities in South Carolina, and a possible tie between that activity and the Abscam case. That information, if true, would be relevant, since during the trial of this case, the government took the position that there was no relationship between the South Carolina investigation and Abscam. Counsel for Jenrette had sought to establish a relationship between the two investigations. He had contended that the Abscam program was "doing a favor" for the agents in South Carolina when they included Jenrette in the Abscam investigation. Since it was felt that that information might be relevant, the Court entered an order requiring the government to produce all the materials turned over to the news service, and in addition thereto, to produce any other related material which may have been redacted or not turned over to the news service. The FBI presented only the materials turned over to the news service. That material was presented to the Court in late January 1983 or early February 1983, together with an undated cover letter from the Department of Justice.

IV

Prior to addressing the specific arguments made by the defendants, the Court finds it necessary to briefly set forth its comments related to general criticisms leveled at the Abscam operation by the defendants; criticisms which have also been raised and discussed in other Abscam cases. Of course, while there is a tendency to group all of the so-called Abscam cases together; each case must be judged upon its own peculiar facts. While some of the same agents were involved in all cases, different issues are raised in each case.

A. *Selection of the Targets.*

It is not entirely clear how Jenrette was selected as a target of the investigation in this case. It is known that,

as Jenrette stated on December 4, 1979, at the W Street townhouse, he had been under investigation in his South Carolina Congressional District as the result of certain land dealings in that state. A friend or friends of Jenrette had also been investigated and at least one had been convicted. Notwithstanding that background, the government had steadfastly contended that the targeting of Jenrette in Abscam had nothing to do with the South Carolina matters. Simply stated, the government contends that it threw the Abscam net into the political waters populated by members of the federal legislature, and Jenrette, through Stowe, was caught. Counsel for Jenrette was persistent in attempting to show some connection between the two investigations. Finally, counsel was able to have produced telegrams dated in May 1979 and November 1979 which suggests that the Abscam operatives were aware or should have been aware of the South Carolina investigation relating to Jenrette.

Unfortunately for all parties, it is not entirely clear how Weinberg first became involved with Stowe; part of the problem being that portions of conversations between Stowe and Weinberg were not recorded. Moreover, the Court is not confident that Weinberg recorded all of the conversations he had with persons connected with Abscam. In any event, the record is clear that Weinberg's interest, and presumably that of the FBI, was not Stowe, but any government official known to Stowe and quite possibly the interest was specifically related to John Jenrette. It is doubtful that Weinberg would have pursued his relationship with Stowe, but for the fact that he felt that Stowe could lead him to a government official, and possibly Jenrette. Once Stowe mentioned a Congressman, Weinberg cultivated Stowe's friendship to gain a meeting with the Congressman.

Since the government contends that there was no connection between the South Carolina case and Abscam, and since there was no clear evidence to the contrary, it ap-

pears that the FBI decided to present a bribe to Jenrette without any evidence or indication that he was predisposed to accept the bribe. Even though it now appears from records obtained by the defendants that the Abscam officials were aware or should have been aware of the investigation of Jenrette in South Carolina, the government states, and the Court accepts, that the investigation against Jenrette was not initiated as the result of the South Carolina affair. Thus, in pursuing Jenrette for a period of at least seven months, and possibly more, the FBI did so without probable cause, or indeed without even a reasonable suspicion that he could be induced to accept the bribe. Certainly, the fact that he was a Congressman gave rise to no such suspicion, nor did anything else known to the government at that time.[23] Thus, without any suspicion that Jenrette had ever taken a bribe, or engaged in any illegal activity, the offering of a bribe to Jenrette in December 1979, and the decision to offer the bribe in November 1979, amounted to no more than a test, a test which could have been given to any member of Congress, any government official, or indeed any citizen.

Stowe was no more than the means to the end, the means to reach a government official and seek to have him accept a bribe. Obviously, the FBI had no particular interest in Stowe except that he might have a connection with a government official, not necessarily a corrupt government official, but one who might be corrupted by Abscam. While it may be that that was not the original intention of the FBI, or indeed the intention of the agents, it seems clear that Weinberg felt no such restraints, and as will be demonstrated, the ultimate decision to go forward and attempt to involve Jenrette in bribery was based, not on a careful analysis and review

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[23] It must be remembered that although Jenrette had been investigated in South Carolina prior to Abscam, the Abscam officials claimed to have had no such information, so that, for all intents and purposes, Jenrette's slate was clean.

of any written records or the tape recordings made during the course of conversations with Stowe but on the intuition or feeling of Melvin Weinberg, a convicted con man. The decision becomes even more questionable when it is recalled that Weinberg financially benefited from each government official he brought in.

The question presented under these facts then is whether the total conduct of the government was outrageous and whether it violated any rights of Stowe and Jenrette, or their rights to fundamental fairness, thus making it necessary to vacate their conviction.

B. *The Issue of Entrapment.*

Another issue which is necessarily presented in this case, but need only be briefly addressed by the Court, is the amount of the bribe offered, and whether, standing alone, that amount was so great as to establish entrapment as a matter of law.

No one can seriously dispute that entrapment was properly raised as a defense in this case. There was not a scintilla of evidence that either Jenrette or Stowe sought out a bribe. Throughout the year or more in which Stowe had numerous discussions with Weinberg, there was no evidence that he was seeking to be a part of a criminal venture. His personal interest, naive though it may have been, was to obtain legitimate financial backing to go into business, hopefully with American Gear & Pinion. It is also clear that he had no intention of bringing any government officials into any illegal act; that was a matter that was pursued solely by Weinberg. The same can be said for Jenrette. There was no evidence that he had ever accepted a bribe, or had engaged in any illegal activity. As noted, while Jenrette had been investigated in South Carolina, the agents in the Abscam operation claimed not to have had that information and therefore that information cannot form the basis for their investigation. Thus, it is clear that the government

through Weinberg and DeVito (Anthony Amoroso), then operating as an undercover agent, planted the seed of corruption in this case. Obviously entrapment was a legitimate defense.

> "'[E]ntrapment' means that law enforcement officials, acting either directly or through an agent, induced or persuaded an otherwise unwilling person to commit an unlawful act. On the other hand where a person is predisposed to commit an offense, that is, ready and willing to violate the law, the fact that the government officials or their agents merely afford opportunities for him to do so does not constitute entrapment."

District of Columbia Criminal Jury Instructions (3d ed. 1978), No. 5.05.

Indeed, the actions of the law enforcement officials "may take many forms including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need." *Id.* There is nothing legally wrong with government agents using decoys or undercover agents "in order to apprehend persons engaged in criminal activities, provided that they merely afford opportunities or facilities for the commission of the offense[s] by one already predisposed to commit it." *Id.* (emphasis added). If the jury finds no inducement, then there is no entrapment. If, however, a jury finds that a defendant was induced to commit a crime, the jury must then determine whether or not the defendant was predisposed to commit the offense. "The defendant's predisposition or willingness to commit the crime charged may be shown by evidence of his prior conduct of a similar character or by evidence, direct or circumstantial, that he was ready to engage in illegal conduct in question." *Id.*

The record in this case was certainly sufficient to support a finding by the jury that the government induced

the defendants to commit the offense; indeed, inducement was the function of Weinberg. In the case of Jenrette, the government agents sought him out, induced him to go to the W Street townhouse and offered him a bribe. Moreover, when he hesitated to take the bribe pending further "research" on his part, the agents continued to urge him to take the money. The bribe was actually offered on December 4, 1979, but Jenrette, after some stalling, did not accept it until December 6 when Stowe hand carried it from DeVito to Jenrette.

On these facts, the jury could find inducement by the government but they could also find predisposition on the part of Jenrette. While he hesitated to take the bribe, there was evidence on which they could find that the hesitation was caused, not by a moral revulsion to a bribe offer, but by his desire to cover himself. He stated that he did not want to take the money without feeling "comfortable about being able to do it [perform the services requested by DeVito]." (Q 132-27). Then he went on to say that "If I take it I'm gonna take it as a, or have a lawyer" (Q 132-27) as if to further explain, he immediately thereafter stated that he would get his law partner there "just to further cover my ass—that he's taking it [the bribe] as a legal fee." (Q 132-28). Moreover, there was no question that Jenrette looked upon the money as a bribe because he specifically referred to it as such. (Q 132-31)

Viewing the video tape of the December 4 meeting on W Street, one could not help but hope that Jenrette was in fact trying to but time to get away from the W Street townhouse to either report the attempted bribe to appropriate authorities, such as the FBI, or to back away completely from any contact with the Abscam undercover agents. Unfortunately, he did not do so; rather, he accepted the bribe on December 6.

After listening to and viewing the entire tapes, the jury could find that Jenrette, although induced to accept

the bribe by the government, was predisposed to commit the crime. Certainly, the conversations on the tapes suggested that Jenrette knew the reason for going to the W Street house. Thus, viewing the totality of the circumstances, there was sufficient evidence that Jenrette was predisposed to commit the crimes of which he was convicted.

The case involving Stowe is somewhat different. Weinberg began to cultivate Stowe as early as October 1978 and continued to pursue him until January of 1980. While Stowe was not the principal target, he nevertheless accepted a part of the bribe money, and if he did not receive the money, he was clearly a part of the conspiracy. But while Jenrette was not approached until late November or early December 1979, Stowe had been approached over a year before. Moreover, the inducement to Stowe was different. Stowe wanted legitimate financing for a business operation and for over a year Weinberg, using the tools of his trade, continued to string Stowe along until Stowe finally ended up inside the W Street townhouse. Stowe was not after the $50,000 bribe, but a legitimate involvement in American Gear & Pinion or a similar prospect. The Court finds much less evidence of predisposition on the part of Stowe than on the part of Jenrette.

As to the amount of the inducement, it was $50,000 with the possibility of an additional $50,000. Although he does not press the point, there simply is no support for an argument that the amount of the bribe was so great so as to constitute entrapment as a matter of law. Certainly $50,000 or $100,000 or double that amount, would not be so large as to excuse a member of Congress who has accepted a bribe.

C. *Control Over Weinberg.*

One criticism of the Abscam operation was that the FBI did not closely monitor the agents and gave too

much freedom to Weinberg. The Court finds this criticism is supported, in part, by the facts.

First it was clear that Weinberg, a convicted con man, would be difficult to contain and that his activities required constant monitoring. He had made a deal with the FBI under which his success in the government sponsored sting or con activities could benefit him financially as well as allow him to remain on probation. It seems that the more successful he was, the longer his involvement in the operation would last, and the greater the financial award he would receive. In a way, he was little more than a modern day bounty hunter. To call him an informer is misleading because he did not *inform* on Stowe or Jenrette, he *induced* them to do certain acts. Near the end of the Abscam operation, Weinberg was making more than many of the supporting agents, and perhaps more than the Attorney General and the Director of the FBI. He was able to make more money by being successful and being successful meant delivering government officials to Abscam. This set of facts would raise questions of Weinberg had he been a mere informer; but Weinberg was a professional con man, one trained in the art of persuading people to do what they either did not intend to do, or did not want to do. And, his criminal record reveals he had been successful in his chosen field. Indeed, the Abscam operation was patterned after a former Weinberg scheme which had been successful. All of these factors raised a red flag concerning the use of Weinberg in the operation.

Second, there was the obvious danger that Weinberg, who gained an introduction to government officials through the FBI agents, would attempt to operate his own confidence game, in lieu of, or in addition to Abscam. There is evidence in this case that Weinberg had accepted money from Stowe but had never reported that to the FBI, and there were allegations of other "gifts" to him. Moreover, one of Weinberg's colleagues, also a

convicted con man, by the name of Melcher, who also worked for Abscam, did yield to temptation and attempted to operate a con game with Abscam.

Third, one would hope that there was concern over the possibility that Weinberg, having been introduced to government officials through the FBI, might attempt to corrupt them, or perhaps, since he was taping telephone conversations, save some of those tapes for use in the future. It is not difficult to imagine that a taped conversation, although not containing any discussion of bribery or any other criminal act, might nevertheless, either in context, or taken out of context, prove very embarrassing for an otherwise innocent individual.

There were many other disquieting facts brought out during the trial which raised a suggestion that Weinberg was not as reliable or truthworthy as the FBI would have the Court believe. Nevertheless, there appeared to be no real effort to assert greater control over him and there was a tendency to accept his word without any support.

One example of the problem was that Weinberg had no specific instructions on recording telephone conversations and there was no systematic means of debriefing him once he had made a telephone call. All of the calls were not made in the presence of FBI agents. Thus, when a telephone conversation was not taped, or was only partially taped, Amoroso and Good were at the mercy of Weinberg's memory as to whom he had spoken to and the contents of the conversation. During the trial, Weinberg proffered that his memory was not always that good. Consider the following questions posed by the Court, and the answers given by Anthony Amoroso, the agent who was the direct supervisor of Weinberg. The Court was questioning Mr. Amoroso concerning Weinberg's introduction to other persons.

THE COURT: How did you determine that?

AMOROSO: By the conversation with Mr. Good.

Q. I see.

Now, as I understand it then on one of these telephone conversations that we have been hearing about Mr. Good . . . Mr. Weinberg would make the call. Was he required at that point to report directly to you?

A. He would either get in touch with me or Mr. Good.

Q. Within what period of time?

Did he have any specific directions?

A. No, as to what period of time?

Q. Yes.

A. No.

Q. A day? A week? A month?

A. Well, he usually contacted us, you know, within every couple of days.

Q. And he had no specific directions?

A. No.

Q. He could have contacted you or not contacted you?

A. If he wouldn't have contacted us within a couple of days, we would get back to him.

Q. If you knew the call had been made?

A. If I knew the—

Q. If you knew that Mr. Weinberg had done something—

A. Well, I was constantly keeping in touch with him. So was Mr. Good, telephonically because, you

know, in situations like that you always keep in touch with him.

Now I think what you are saying did I know that he had made a call?

Q. Yes.

A. Or not.

Q. You did not know, did you?

A. Unless he told me.

Q. So you had to rely strictly upon his word?

A. Correct.

Q. And he was not required by you or Mr. Good, if you know about Mr. Good, to report telephone calls made?

A. Not by me. I don't know about Mr. Good, Your Honor.

Trial Transcript, September 12, 1980, 913-915.

The fact that there was no uniform procedure for debriefing Weinberg, and the possible problems such a lax procedure could raise, was made clear by the now famous case of the missing tapes. At one point, Weinberg advised the agents that someone had stolen tapes and cigars from his bag at an airport. The bag also contained a tape recorder. He stated that no other items of value had been stolen. The fact that the tapes were stolen however did not raise any great concern with the government agents even though Weinberg could not recall the contents of the conversation or with whom he spoke. During a post trial hearing, the Court questioned Mr. Good about the lost tapes.

THE COURT: My question is: Once that [the missing tapes] was reported to you by Mr. Weinberg what action did you take, if any?

MR. GOOD: Well, I instructed that the agents at both the JFK RA, which covered LeGuardia Airport also, contact the appropriate people at the airlines there and also a phone call was made to the West Palm Beach resident agency where the agents there contacted the personnel at the airlines there, and I also notified F.B.I. Headquarters, Mike Wilson.

Q. What did you learn as a result of your investigation?

A. The contacts at both airports proved to be negative.

Q. Now, Mr. Good, so you did not recover the tapes?

A. No, we did not.

Q. But you are—are you satisfied the tapes are in fact missing?

A. That is correct.

Q. Those three tapes?

A. Yes, your Honor.

Q. Did you ever hear a report that the tapes were more than three, something like 16 or 19?

A. I heard that from people who really had no connection with the case, primarily from people over in Newark who were saying that there were 16 tapes or more missing, but not from anybody that was directly associated with the incident.[24]

Q. When you refer to the people in Newark, are you referring to Mr. Plaza and Mr. Weir? [25]

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[24] The only person directly associated with the incident was, of course, Melvin Weinberg.

[25] Mr. Plaza and Mr. Weir were Assistant United States Attorneys in the District of New Jersey.

A. I would think it originated with them, or from somebody that was associated with them. . . .

Q. Did you—and I may have asked this question before, Mr. Good. If I have already asked the question, why I apologize to you. Did you make any effort to debrief Mr. Weinberg concerning the contents of the tapes?

A. I, personally, didn't, but one of the other agents did, and they informed me that he couldn't recall exactly what was on those tapes. He felt that they were tapes that were not of much consequence, because if they were he would have called us and notified us what was on the tapes prior to his even coming up, and—

Q. How soon after the tapes were stolen did this agent attempt to debrief him?

A. It would have been the same day.

Q. Then I am just a little bit confused. You say that Mr. Weinberg said that they were not of great importance?

A. He couldn't recall the substance of any of the conversations. He didn't recall having taped any calls during that particular time frame that were tremendously meaningful, or he would have called us immediately, or reported to us immediately what was on those tapes.

Q. But the agent spoke to him, I think you said within a day?

A. Yes, that is correct. But these tapes would have been made during a prior week or two before he came from Florida to New York.

Q. Well, I am still not sure I am following you. Are you saying if the tapes had been particularly meaningful he would have called you at the time the tapes were made?

A. At the time the tapes were made, I think on occasions in the past, for example if they got a phone call immediately prior to the date of a pay off or a few days prior to a date of a pay off where there was a very meaningful conversation he would call us immediately and in many cases we sent somebody out to pick up that tape and fly it to Washington, or to Brooklyn, or to whoever was making the decision as far as the case was going to proceed.

Q. During this particular taping session or whatever it was involving the tapes that were subsequently lost, was there an agent with Mr. Weinberg?

A. I don't believe so. It would have been an agent who would have been available to him had he had need for one. There wouldn't be one staying with him at his house at that time.

Q. Who would have made the determination that these tapes were of importance or significance, Mr. Weinberg?

A. No. It would have been in the course of our conversations with him.[26]

Q. You wouldn't know that unless he called you.

A. We would talk to him every day.[27]

Q. But he did not mention these tapes?

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[26] Obviously, Weinberg made the determination whether the call was important or significant. If he did not tape a conversation, he did not call the agents.

[27] This also raises questions. If the agent would speak with Weinberg every day, why would not Weinberg brief the agent on all calls that he had made even those calls which may have been insignificant? Seemingly, he would have at least indicated that an insignificant call was made to a particular individual. It would also seem that the FBI would have required Weinberg to keep a log of any and all calls involving Abscam.

A. No, he didn't. He would mention so and so might have called, but nothing of any consequence.[28] Sometimes he would get calls that he wouldn't go into any details with us about, particularly at that period of time, because it was in the last phase of the investigation and we were concentrating on things he really wasn't involved in at that time, primarily the Philadelphia situation.[29]

Q. Well, when he made these calls would he speak with you or Mr. Amoroso or someone else?

A. It would have been either Amoroso or myself, or it could have been one or the other agents. It would have been dependent upon where we were, what we were doing. During that period of time, I was in Philadelphia so it would have been unlikly that he spoke with me. He may have spoken to Bruce Brady or someone of the other agents who was there in Havppagugue at the time.

Q. Did you, personally, discuss this matter with Mr. Brady?

A. As far as—

Q. What was on the tapes?

A. What was on the tapes? I may have, but I don't recall, specifically, Your Honor at this time.

Q. To your knowledge did Mr. Brady or yourself or Mr. Amoroso or whichever agent Mr. Weinberg may have contacted, did any of you at the same time you

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[28] Of course, here apparently Weinberg did not mention that "so and so might have called" because Weinberg could not remember who did call and the FBI had no record of who may have called Weinberg during that two week period. This makes quite clear that it was Weinberg who was making the determination of the importance or significance of the tapes, not Mr. Good or Mr. Amoroso or the FBI.

[29] If Weinberg wasn't involved at this point, why was he making calls?

received these telephone calls make any notes concerning the contents of the call and the contents of the tape?

A. Not to my knowledge.

Q. How did you keep track of, I think I may have asked you this before, but with all of these investigations going on—Mr. Weinberg somewhat off on his own making a variety of calls, how did you keep track of what to expect from Mr. Weinberg in the way of tapes?

A. Well, during the course of the investigation when we were traveling together, which was a good portion of the time with the cases, those tapes would be immediately taken into the custody of an agent, usually Agent Brady or Agent Bursey would assume custody of those tapes immediately upon the phone call having been made, or the taping having taken place.[30]

Hearing Transcript, May 14, 1981, 858-863.

But, of course, Amoroso told the Court that Weinberg did not have specific instructions on what to report. Moreover, Good's testimony indicates that the agents should have had concern over Weinberg's activities and his memory, since he could not remember the substance of the conversation, or even who he had spoken to, although at one point Good had indicated that Weinberg was debriefed by the agents on the day he reported the tapes stolen.

In addition, the issue of the missing tapes did not necessarily implicate Weinberg in any wrongdoing. The

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[30] This was, of course, dependent upon Weinberg advising the FBI that a telephone call had been made. In addition, it is quite obvious that this procedure was not utilized at all times, because Mr. Good himself stated that "these tapes would have been made during a prior week or two before he came from Florida to New York. (Hearing Transcript May 14, 1981, 863.)

tapes and the cigars may have been stolen, or they may have been lost, but certainly the incident raised questions concerning the reliability of Weinberg. First, was he telling the truth, had the tapes actually been stolen? This raises other questions including why were Abscam tapes in Weinberg's possession and in an unlocked bag. If he had been debriefed the same day he reported the tapes missing and could not remember the substance of the conversations or who he had spoken to, presumably, the calls had been made some time ago. In fact, Agent Good testified that the calls may have been a week or two prior thereto. Second, why would someone steal blank tapes and cigars and nothing else of value? Certainly the cigars had no value, and the tapes had little value; unless the person who stole the tapes knew of the contents of the tapes. If this was the case, that raises the question whether someone had breached Abscam's security, a matter which would seemingly be of concern to the government. Third, if the tapes were stolen by someone seeking more than blank cassette tapes, who was recorded on the tapes. Weinberg professes not to know. Could those tapes thereafter be used to slander or libel an innocent citizen and in that regard, what would be the responsibility or the liability of the government. Fourth, why wasn't Weinberg required to keep a log of his calls—and why wasn't he required to report *every* call to the FBI, whether significant or insignificant. The agents and Weinberg testified that he had never been briefed on the issue of entrapment and Weinberg was not a lawyer nor a sworn officer of the United States. Yet it is clear that he was entrusted with maintaining security over tapes which could be extremely sensitive.

The quoted portions of the record and the testimony of Agents Amoroso and Good indicate that the control over Weinberg was less than stringent, this being so even though Weinberg was a convicted con man with an extremely questionable background, and even though one other con man, Melcher, had attempted to use Abscam

for his own purposes. The record further reveals that not only was there a lack of control over Weinberg, but that he made decisions which should only have been made by officers of the United States, a fact indirectly admitted by the agents. At one of the several post trial hearing in this case, the Court asked the following questions of Special Agent Good, the agent in charge.

> THE COURT: Did you know that Mr. Stowe was interested in a financing program for American Gear & Pinion?
>
> MR. GOOD: I became aware of that, yes, I did.
>
> Q. When did you become aware of that?
>
> A. It would have been in November after the 15th.[31]
>
> Q. But you were not aware of that before that date?
>
> A. I was aware that he was interested in financing, in obtaining financing for a number of different things. I don't believe I knew that Gear & Pinion was mentioned before that, but it may have been.
>
> Q. What sort of reports did you receive concerning Mr. Stowe from Mr. Weinberg? How was he described?
>
> A. He described him, as he said, a con man.
>
> Q. He described Mr. Stowe as a con man?
>
> A. Yeah.
>
> Q. Did Mr. Weinberg refer to any other cons that Mr. Stowe may have been involved in?
>
> A. No, he didn't.
>
> Q. What specifically was he referring to when he said "con man"?

---

[31] The 15th is significant because that is the date that Weinberg made an unrecorded call to Stowe in order to set up the actual contact with Congressman Jenrette.

A. Well, I guess from the way he conducted himself, how he was looking to get money; he suspected him of some kind of devious motive because of the way he dealt, basing it on his experiences in dealing with people of this nature.

Q. And Mr. Weinberg had dealt with people of this nature, hadn't he?

A. Yes, that's correct.

Q. Because he was a con man.

A. That's correct.

Q. Now, you have referred to devious nature. Did Mr. Weinberg spell that out for you?

A. Not in real specifics that I could give you examples. He said he was cautious. He would offer a deal and then when you actually started pursuing it he asked a lot of questions. He suspected him of checking us out and things like that.[30]

Q. He suspected—

A. Stowe, of checking us out.

Q. Did he indicate why he had that suspicion?

A. Just a feeling he had.

Q. But he was not very specific?

A. No, he wasn't.

Q. What about Mr. Amoroso?

A. His impressions were primarily based on his conversations with Mr. Weinberg.

Q. So we are really relying on Mr. Weinberg at this point?

A. That's correct.

---

[32] The transcripts of the calls between Stowe and Weinberg which were recorded would not support this contention.

Q. Would it be fair to say that we are really relying upon Mr. Weinberg's impression up to the period of November 15, 1979?

A. I would say that to be correct.

Q. Because you did not, as I understand it—and correct me if I'm wrong—you did not personally review the tapes as of that time?

A. No, I did not.

Q. Is there any reason why you did not review those tapes?

A. Primarily because of the involvement in such a wide scope of investigation and this was an area that we did not have as as top priority at that time.

Hearing Transcript, November 13, 1980, 443-446.

Again another indication of the authority of Weinberg is made clear by Good's response to certain questions by the Court concerning Mr. Weinberg and the lost tapes.

THE COURT: Had you received any information that certain tapes made by Mr. Weinberg either relating to this case or some other case involving Abscam may have been either lost or stolen?

A. Yes, I did.

Q. When did that information come to your attention?

A. I believe it was in January of '80 when he came up from Florida and brought some tapes with him and his bag was broken into at the airport.

Q. His bag was broken into?

A. Yes.

Q. Do you know what was stolen from his bag?

A. Cigars and some tapes.

Q. Do you know what else may have been in the bag?

A. His clothes.

Q. And a tape recorder?

A. And a tape recorder.

Q. A tape recorder was not taken?

A. I don't believe so.

Q. Clothes were not taken?

A. Clothes were not taken.

Q. The tapes were taken?

A. Yes.

Q. And the cigars were taken?

A. And the cigars.

Q. Did that arouse suspicion at all?

A. As far as Weinberg is concerned?

Q. And his activities.

A. No, it didn't.

Q. What were the contents of those—how many tapes were taken?

A. I think there was four or five tapes.

Q. Do you know how many conversations were on those tapes?

A. No, I don't.

Q. Probably more than four or five?

A. I would doubt it because at that particular point we had told him to use a separate tape for each conversation and he had done that.

Q. You mean if those conversations were pertinent?

A. If they were pertinent, right.

Q. And whether it was pertinent or not depended upon Mr. Weinberg?

A. Yes.

Hearing Transcript, November 13, 1980, 451-453.

The fact that there were certain problems with Weinberg by virtue of his lack of memory at times did not appear to trouble the agents as is brought out in the answers of Mr. Good in response to questions from the Court.

> THE COURT: All right. With respect to these tapes, these four or five tapes that were lost, were you briefed as to the conversations contained on those tapes?
>
> MR. GOOD: No, I wasn't.
>
> Q. Who was?
>
> A. I don't think anybody could recall. I don't think Weinberg could recall exactly what tapes were lost and what ones weren't and he wasn't able to identify what conversations were lost.
>
> Q. He was not able to identify the persons involved?
>
> A. Right.
>
> Q. Without naming any names do you know how many persons he had perhaps spoken to in that period of time?
>
> A. No, I do not.
>
> Q. But this was in Miami?
>
> A. In Florida, yes.
>
> Q. In the Florida area. Did you not feel it was important to determine what may have been said in those conversations?
>
> A. If we could have identified what tapes were missing and who the parties were involved we would have made an effort.
>
> Q. Mr. Weinberg could not do that?
>
> A. He couldn't, no.

Q. Didn't that strike you as a little unusual?

A. No, not really because he gets so many phone calls in the course of a couple of weeks that its pretty hard for him to keep track unless he has the tape of exactly who he calls and exactly who called him.[33]

Q. So what you're saying is in order to really recollect what had happened in any particular call Mr. Weinberg would really have to have a tape or notes?

A. I would say that, you know, to be specific, yes.

Q. And he never kept notes?

A. No, he didn't.

Q. And this was a matter, a factor, I take it, that was known to you.

A. That's correct.

Q. Did you ever instruct him to keep notes.

A. No, I didn't.

In short, this Court concludes that Weinberg was allowed to operate without clear guidelines. He was not required to keep logs of his contacts with other persons even though those contacts were made out of the presence of FBI agents. He was not required to keep notes of conversations he had and he was not required to report at specific times for debriefing. He was not required to submit written reports on unrecorded calls, or those portions of recorded calls which were unrecorded. Moreover, the agents at times relied upon Weinberg's "impressions" as to whether or not they should make their next move. In this case, the telephone call of November 15, 1979, was

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[33] For this very reason, and since this matter was known to the FBI, it would seem that Mr. Weinberg would have been required to either keep a log or make notes after all telephone conversations.

based not upon facts known to the agents or even facts related to the agents by Weinberg; the call was based upon the impressions of Melvin Weinberg.

D. *The Failure to Require Written Reports in Abscam.*

Another criticism leveled at Abscam by the defendants is the failure of the FBI, and the Department of Justice, to require agents to submit written, as opposed to oral reports. The government concedes that few if any 302 reports were made in these cases, and in particular this case. Weinberg, who was involved in the several Abscam cases, and who professed that his memory was not that good, would orally report to Amoroso, who in turn would orally report to Good, who in turn would orally report to his superiors, and so on up the ladder. It was because of this failure to require written reports, that superiors may have made decisions which they thought were based on facts, which were only based upon the impressions of Melvin Weinberg. This, of course, relates to the issue of who authorized the offer of a bribe to Jenrette since there is no written report for such an offer. It is quite clear then that the decision to initiate a bribe offer was made without probable cause to believe that Jenrette had ever accepted a bribe in the past, or had ever been involved with the law, or that he would accept a bribe at this time. It was also made without even a reasonable suspicion that he would accept a bribe because the decision to initiate the bribe was made by Weinberg. Since there were no written reports, it is hard to understand how the upper echelon of the Bureau or the Department of Justice could have done more than to rubber stamp a decision by the lower echelon to offer a bribe to a particular individual.

Such a procedure appears incredible when one considers the stakes involved. This was not an operation involving known or suspected criminals in the drug trade; this was an operation which was to have a lasting effect

on the public's view of elected public officials, and an operation that would reach into the halls of the Congress of the United States. Moreover, this was not a routine "sting" operation where the government sought to attract persons who had *already committed* a crime or crimes, or who were suspected of already having committed crimes. It is for this reason that the Court stated early on that it is important to distinguish each one of the so-called Abscam cases, since it is quite possible that in some of the other cases the agents did have a reasonable suspicion that at least some of the individuals involved had participated in criminal acts or were likely to participate in criminal acts. In the case of Jenrette and Stowe, it was clear that what the government sought to determine was whether an elected government official could be induced to commit a crime by a convicted professional con man. It was nothing more than a test of the integrity and moral fiber of a member of Congress, a test which he failed to pass.

V

Having discussed the more pertinent facts in this case, and some of the criticisms leveled at the Abscam operation in general, the Court now turns its consideration to the specifice complaints made by the defendants.

First, the defendant criticized the failure of the government to make discovery pursuant to the orders of the court and the Federal Rules of Criminal Procedure. Specifically, the defendants complain that the government (1) failed to provide complete information concerning Weinberg's compensation, (2) failed to furnish information relating to the background of the discussions between Weinberg and Stowe concerning certificates of deposit, (3) failed to furnish information on when it was decided to use Stowe to "get a politician", and (4) failed to furnish information concerning any connection between the South Carolina investigation of Jenrette and his investigation in Abscam.

As has already been noted, it is unclear exactly how much Weinberg has received and is to receive as the result of his activities in this case and the related cases. The significance of that information however is not the exact amount he did recover or is expected to recover, but whether his receipt of funds would cause a possible bias which should be brought to the attention of the jury. In this case, it was abundantly clear to the jury that Weinberg had received and was to receive a considerable amount of money as the direct result of his involvement in these cases. The record also makes clear that the longer the operation and the more successful the operation, the more Weinberg was likely to receive. Such evidence was completely and properly exploited by the defendants and argued to the jury. The unanswered questions raised by the defendants concerning Weinberg's compensation, weighed against the government.

Over all, there seemed little to support the credibility of Weinberg. Notwithstanding the protestation of the government agents, or their instructions to Weinberg, they were unable to completely monitor Weinberg. He had no specific directions to report every telephone call or to record every telephone call, he was not systematically debriefed concerning his activities, he had convenient lapses of memory, and he had a motive to lie. Moreover, his credibility was impeached by his background, a convicted con man, who stood to gain not only more money from Abscam depending upon how many government officials he could bring into the net, but some form of absolution from his probation requirements. Why then did the jury convict the defendants on the questionable word of Weinberg? The answer is simple, they did not; rather, they convicted the defendants on the audio and video tapes introduced in evidence, tapes which were clearly admissible. Thus, this Court cannot find that the failure of the government to produce additional information concerning the compensation paid to Weinberg would

have had any effect in this case. In short, one picture in this case was worth a thousand words. One cannot help but feel revulsion and disgust at seeing an elected government official accept a relatively small amount of money in exchange for agreeing to violate his public trust.

Indeed, it seems unlikely that any jury can seriously consider the defense of entrapment when they actually see the crime committed. In most cases where an etrapment defense is raised, there is almost overwhelming evidence that the defendant committed the offense. For example, the defense is often raised in narcotics cases and in cases involving charges of sexual solicitation. In those cases, evidence concerning the commission of the crime and evidence supporting the defense of entrapment is usually submitted by way of testimony, and the jury then weighs the testimony to determine the issues of whether the crime was committed and whether there was inducement and predisposition. Even then, it is rare that a jury is convinced that a man who committed the crime was not predisposed to do so. Realistically then, the average citizen apparently finds it difficult to release a defendant based on entrapment when he knows the defendant committed the crime. It is not difficult to imagine then that it is extremely difficult for a citizen to apply the defense of entrapment when he actually observes the commission of the offense on a video tape and need not rely on testimony to make this determination. This is not to suggest that it was unfair for the Abscam investigators to make audio and video tapes to record the commission of the crime, since in the view of this Court, every reasonable and lawful means should be used to detect, record and present evidence of the commission of the crime. Moreover, audio and video tapes allow the finder of fact an instant playback, a chance to observe the actual demeanor of the defendant and the demeanor of the officers and agents of the government, and to hear their very words. But realistically, once the

jury has done so, it seems virtually impossible to convince them that the defendant was entrapped. And this is especially true where the defendant is an elected and appointed official who is sworn to uphold the law.

Thus, even assuming that the government should have made a full disclosure of other facts, it seems extremely unlikely that it would have changed the course of this trial. The Court after considering the various contentions made by the defendants, other than the issue of entrapment as a matter of law and violations of fundamental fairness, finds them all without merit.

VI

The only issues remaining then are whether the actions of the government reach "a demonstrable level of outrageousness", *see Hampton* v. *United States*, *supra*, 425 U.S. at 491-495 & n.7, 96 S.Ct. at 1650-1653 & n.7, (Powell, J. concurring), and whether there was entrapment as a matter of law. The first issue is no longer open to question in this circuit in view of the decision in *United States* v. *Kelly*, *supra*. That court considered similar claims of outrageousness and alleged violations of fundamental fairness in yet another Abscam case and reversed the district court's granting of the defendant's motion for judgment of acquittal. The court noted that, "[w]ithout further Supreme Court elaboration, we have no guide to a more dynamic definition of the outrageousness concept, and no warrant, as lower court judges, to devise such a definition in advance of any signal to do so from higher authority." *United States* v. *Kelly*, *supra*, 707 F.2d at 1476 & n. 13 (Ginsberg, J. concurring). Kelly, at the time a Member of Congress, was also caught in the web of Abscam. In view of the decision in *Kelly*, the defendants' claims for acquittal based upon outrageousness of conduct or violations of fundamental fairness must be denied.

While the Court finds that the conduct of the government in reaching out to bring Jenrette and Stowe into Abscam and in using a con man to do so, when there was no evidence that either man had previously committed a crime or that they were presently ready, willing and able to commit a crime at the time approached by Abscam personnel, at least bordered on the outrageous, the *Kelly* decision makes any further discussion of this issue unnecessary.

As to entrapment, the Court finds no basis to conclude that Jenrette was entrapped as a matter of law. His involvement before accepting the bribe was relatively short, and, as the Court has already found, Part IV B, *supra*, there was ample evidence for the jury to find that, even though induced to commit the crime, he was predisposed to do so. His own words and actions will forever haunt him in that regard.

The issue of entrapment as it relates to Stowe raises a more difficult question. Like the case of Jenrette, the jury had the opportunity to listen to the many taped conversations between Stowe, Weinberg and Amoroso and to observe Stowe on video tape. But, as the Court has already observed, it is not realistic to believe that a jury, actually observing the defendant commit the crime, is going to release him under a theory of entrapment. What makes this case more difficult is that Weinberg actively pursued Stowe for more than a year, promising to assist him in obtaining legitimate financing for a legitimate project. Stowe was not interested in bribery, and Weinberg knew or should have known that. There is no evidence that he was interested in bringing Jenrette into his financial picture. But Stowe was the key to Jenrette and there Weinberg, unguided by any instructions from the federal agents, continued his con on him and worked him by suggesting that he was about to receive financing. When Stowe seemed to tire of the game, Weinberg would give more hope. This was the

classic stick and carrot game, the classic con game and the government had retained an expert in its execution. The government was never after Stowe—the target was always "some congressman" presumably Jenrette.[34]

However, the issue of entrapment, was fully set forth and presented to the jury and they were carefully instructed in this case. They were instructed as to inducement and as to predisposition. They had a chance to observe the tapes, both audio and visual, and to weigh the actual words of Stowe in determining whether he was predisposed to commit the crime. This Court finds the actions of the government in pursuing Stowe through Weinberg for well over a year to amount to outrageous conduct, since throughout that time, Weinberg was attemping to con Stowe into committing a crime. But the Court is without any guidelines since this issue directly relates to the issue of fundamental fairness, and due process. Once again, the Court finds it must stay its hand in view of the decision in *Kelly*. The Court observes however, as did the district court and the court of appeals in *Kelly*, that the Abscam drama was "an unwholesome spectacle". See —— U.S. App. D.C. ——, at ——, 707 F.2d at 1477.

The motions are denied.

Dated: July 30, 1983

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

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[34] It seems unlikely that the agents did not know that the congressman referred to by Stowe was Jenrette. Any child in school could have determined that in a matter of minutes by finding out who represented the Sixth Congressional District in South Carolina.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 80-289

UNITED STATES OF AMERICA

v.

JOHN W. JENRETTE, JOHN R. STOWE

[Filed Aug. 4, 1983]

ORDER

This comes before the Court on the motions for judgment of acquittal, or in lieu thereof, for a new trial, filed by the defendants. After giving careful consideration to the motions, and the opposition thereto, together with the arguments of counsel, and the record in this case, the Court concludes, for the reasons set forth in the Opinion filed herein, that the motions must be denied. In view of the above, it is hereby

ORDERED that the motions for judgment of acquittal, or in lieu thereof, for a new trial, are denied, and it is further

ORDERED that the Probation Office shall prepare a Presentence Report as to each defendant, said report may be prepared by the Probation Office in this District, or if directed by the Probation Office, by a Probation Office in another District, with final recommendation by the Probation Office in this District, and it is further

ORDERED that the defendants remain on the same bond with the same conditions, and that once the presentence reports are completed, the defendants shall report to the Court on the date to be set for sentencing, and in the event the defendants fail to report, the Court shall issue a bench warrant for their arrest, and it is further

ORDERED that in the event the parties intend to file sentencing memoranda, said memorada shall be filed not less than ten calendar days before the date set for sentencing.

Dated: August 4, 1983

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

EXCERPTS FROM DISTRICT COURT DOCKET SHEET, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, NO. CR-80-289, *United States* v. *Jenrette*, December 9, 1983

Sentencing of defendant (Counts 1-3) (Two (2) years and a FINE of ten thousand dollars ($10,000.00) on each of counts 1 and 2. Said sentence to run concurrent by counts as to time imposed and consecutive by counts as to FINES imposed. Two (2) years and a ten thousand dollar ($10,000.00) FINE on count 3. Said sentence to run consecutive to sentence imposed in counts 1 and 2. EXECUTION OF SENTENCE SUSPENDED in count 3. Probation five (5) years.) (JUDGE PENN (Dkt'd 12/12/83).

Motion made in open court (MOT#38) (by defendant for release on personal recognizance pending appeal.) Dkt'd 12/12/83).

Motion granted (MOT#38) (of defendant for release on personal recognizance pending appeal. Defendant on personal recognizance. (Rep: J. McGinn)) (JUDGE PENN) (Dkt'd 12/12/83).

Issued judgment and commitment to U.S. Marshal (Counts 1-3) (JUDGE PENN) (Dkt'd 12/12/83).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Criminal No. 80-00289-01

No. 83-2281

UNITED STATES OF AMERICA

v.

JOHN W. JENRETTE,

Appellant

[Filed Sept. 18, 1984]

Appeal from the United States District Court
for the District of Columbia

Before: WRIGHT, TAMM, and STARR, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 18, 1984

Opinion for the Court filed by Circuit Judge Tamm.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Criminal No. 80-00289-01

No. 83-2281

UNITED STATES OF AMERICA

v.

JOHN W. JENRETTE,

Appellant

[Filed Oct. 22, 1984]

Before: WRIGHT, TAMM and STARR, *Circuit Judges*

ORDER

On consideration of the Petition for Rehearing of Appellant filed October 9, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Criminal No. 80-00289-01

No. 83-2281

UNITED STATES OF AMERICA

v.

JOHN W. JENRETTE,

Appellant

[Filed Oct. 22, 1984]

Before: ROBINSON, *Chief Judge*; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

The Suggestion for Rehearing *en banc* of Appellant has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Mikva did not participate in this order.

STATUTES INVOLVED

18 U.S.C. § 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 201(c)

Whoever, being a public official or persons selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty;

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Office - Supreme Court, U.S.
FILED
APR 23 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1171

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN W. JENRETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
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12 pp

QUESTION PRESENTED

Whether the government's investigation of petitioner, a Member of Congress, was so outrageous that the Constitution requires that his conviction be overturned.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1171

JOHN W. JENRETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 744 F.2d 817. The opinion of the district court (Pet. App. 19a-65a) is reported at 594 F. Supp. 769.

JURISDICTION

The judgment of the court of appeals (Pet. App. 69a) was entered on September 18, 1984. A petition for rehearing was denied on October 22, 1984 (Pet. App. 70a-71a). On December 7, 1984, the Chief Justice extended the time to file a petition for a writ of certiorari to January 20, 1985, and the petition was filed on January 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on one count of conspiracy to defraud the United States and to

commit bribery, in violation of 18 U.S.C. 371, and on two counts of bribery, in violation of 18 U.S.C. 201(c). He was sentenced to concurrent two-year terms of imprisonment on the conspiracy count and the first bribery count; on the second bribery count, imposition of sentence was suspended and petitioner was placed on probation for five years. Petitioner was also fined $10,000 on each count. Pet. App. 68a. The court of appeals affirmed (*id.* at 1a-18a).

1. Petitioner is one of a number of public officials and private citizens who were convicted as a result of the FBI's Abscam investigation. In this investigation, the FBI established a fictitious company named Abdul Enterprises, the owners of which were supposedly wealthy Arab sheiks. FBI Agent Amoroso, together with informant Melvin Weinberg, posed as the sheiks' representatives. In a series of recorded conversations and videotaped meetings, they offered bribes to public officials who would agree to help the sheiks immigrate into the United States at some point in the future when the sheiks might need such assistance. Pet. App. 2a.

The Abscam operatives were introduced to petitioner by John Stowe, a friend of petitioner who sought financing from the sheiks for various business deals. Stowe first mentioned petitioner to Weinberg in October 1978, when Stowe and Weinberg were discussing a scheme for bringing bank documents into the United States; Stowe said that he believed certain difficulties could be overcome because "my contact is a Congressman." Stowe added: "He's as big a crook as I am * * *." Pet. App. 22a-23a; see *id.* at 3a & n.2. Weinberg and Stowe continued their discussions, and in November 1979 Weinberg told Stowe that the sheiks were interested in discussing with petitioner the possibility of a private immigration bill. Weinberg asked Stowe to determine whether petitioner would introduce such a bill for $100,000. In early December 1979, Stowe met with and

called Weinberg and Amoroso to confirm his understanding that $100,000 would be paid to petitioner and to arrange a meeting with petitioner. Pet. App. 3a & n.3.

Petitioner first met with the Abscam operatives on December 4, 1979. The meeting was videotaped. Amoroso explained that his clients might need help entering the United States; petitioner responded by stating that he would introduce a private immigration bill or arrange to have one introduced. Amoroso said to petitioner: "We're talking about fifty thousand dollars now and fifty thousand dollars when this thing is introduced." Petitioner then discussed the possibility of having a private immigration bill introduced simultaneously in the Senate. He also discussed with the Abscam operatives how a payment might be made and said that he might want his law partner to attend a meeting with the sheik's representatives "just to further cover my ass." Pet. App. 3a, 4a, 28a. The district court, in denying petitioner's post-trial motion for a judgment of acquittal, described the events at this meeting as follows (*id.* at 28a-29a; citations omitted):

> It is clear that during the December 4 meeting [petitioner] understood that he was being offered a bribe. He notes at one point that, "I dunno a thing. I don't know that I've taken a bribe and I dunno know that that you've offered me a bribe." He immediately stated however that he would feel "more at comfort if I could come back tomorrow and say OK." * * * He also stated later on, "ya, and I'd like to have your money. Don't get me wrong. I'd like to do it, I'd like to help you." As if to set aside any doubt as to his state of mind, [petitioner] advised [Amoroso] "are we clear, I mean I, well listen, don't get me wrong, I don't I — I got larceny in my blood. I'd take it [the money] in a goddamn minute." [Petitioner] did not accept the bribe at that

> point but left the [meeting] to think it over, the impression being that he wanted to make sure he could produce on his promise.

Petitioner telephoned Amoroso on the following day, December 5, to say that he would go forward with the transaction. The next day, petitioner again called Amoroso, saying that he wanted Stowe to pick up the money; petitioner explained that that procedure would "keep[] me just a little bit ah one step away from a section in the code about, uh, public officials." Pet. App. 32a; footnote and citation omitted. After Stowe collected the money, petitioner confirmed with Amoroso in a telphone conversation that he had received it (*id.* at 4a).

Petitioner and Stowe met again with the Abscam operatives on January 7, 1980; at that time petitioner claimed that he might be able to interest Senator Thurmond of South Carolina in introducing a private immigration bill in exchange for cash. Petitioner and Stowe continued to have contacts with Amoroso and Weinberg regarding the proposed bribery of Senator Thurmond until they were arrested. Pet. App. 4a-5a.

2. After trial, petitioner unsuccessfully moved for a judgment of acquittal on the grounds that the prosecution's tactics were so outrageous as to violate the Due Process Clause; that he was entrapped as a matter of law; and that the government failed to comply with its obligations to disclose exculpatory evidence in its possession (Pet. App. 19a-65a). On appeal, petitioner renewed these contentions and also asserted that the district court erred in failing to instruct the jury on the defense of duress. The court of appeals rejected these contentions and affirmed petitioner's convictions. *Id.* at 1a-18a.

ARGUMENT

Petitioner's sole contention is that the government's conduct of the undercover operation that led to his conviction

was so outrageous that the Due Process Clause and separation of powers principles require that his conviction be set aside. A similar argument has been advanced by other defendants whose convictions resulted from the Abscam investigation; it has been uniformly rejected by the courts of appeals, and this Court has repeatedly denied review. See, *e.g.*, *United States* v. *Jannotti*, 729 F.2d 213 (3d Cir.), cert. denied, No. 83-1891 (Oct. 9, 1984); *United States* v. *Silvestri*, 719 F.2d 577, 581 (2d Cir. 1983); *United States* v. *Weisz*, 718 F.2d 413, 440-441 (D.C. Cir. 1983), cert. denied, No. 83-1036 (Feb. 21, 1984); *United States* v. *Williams*, 705 F.2d 603, 619-622 (2d Cir.), cert. denied, No. 83-256 (Dec. 5, 1983); *United States* v. *Myers*, 692 F.2d 823, 836-843 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). There is no more reason for the Court to grant review on this occasion.

The record of this case shows that, contrary to petitioner's assertion (see, *e.g.*, Pet. 2, 12), government agents did not "target[]" him or pursue him with temptations designed to "test [his] * * * moral fiber"; on the contrary, at each step of the investigation they took actions that were reasonable and appropriate in light of the information about petitioner that had previously come to their attention. Thus, the agents undertook an investigation of petitioner because Stowe, in the course of discussing business arrangements of questionable legality, identified petitioner as his "contact" and a "crook." The agents then did not themselves approach petitioner but offered a bribe through Stowe. At that point, petitioner agreed to meet with the agents and unmistakably revealed his willingness to be bribed. Petitioner then contacted the Abscam operatives on the following day, arranging to have Stowe collect the money on the day after. Petitioner is unable to identify any point in this chain of events at which the Abscam operatives subjected him to unfair or unreasonable pressures or temptations.

Petitioner devotes much attention (*e.g.*, Pet. 6-8) to Weinberg's dealings with Stowe; petitioner asserts that Weinberg's object throughout his relationship to Stowe was to see if petitioner could be corrupted. But even if this characterization of Weinberg's objectives is correct, petitioner does not explain why *he* is entitled to complain. Petitioner acknowledges (Pet. 7-8) that the Abscam operatives did not in any way offer a bribe to him until November 15, 1979, and that at that point they did not contact petitioner directly but made the offer to Stowe, who conveyed it to petitioner. Stowe promptly arranged a meeting among petitioner, Weinberg, and Amoroso, and within three weeks petitioner had accepted a cash bribe. This hardly constituted a "relentless pursuit" of petitioner (Pet. 7) or an exploitation of his weaknesses.

Petitioner also emphasizes three other factors that, he suggests, combined to make the government's investigation of him fundamentally unfair: the "overwhelming" (Pet. 12, 13) size of the bribes he was offered; his alcoholism (see Pet. 5-6, 13); and the Abscam operatives' alleged effort to make Amoroso appear to be a threatening gangster (see Pet. 14). But the district court found — and its conclusion is clearly correct — that the amount of money offered to petitioner was by no means excessive. "Certainly $50,000 or $100,000 or double that amount, would not be so large as to excuse a member of Congress who has accepted a bribe" (Pet. App. 42a; see *id.* at 11a). While petitioner intimates (Pet. 8-9) that he was drunk during the December 4 meeting, drunkeness is a defense to a criminal charge only if it renders the defendant incapable of forming the specific intent, if any, that is an element of the offense. Petitioner does not even suggest that he lacked the intent necessary to commit the offense of bribery at the December 4 meeting; and even if he did lack the necessary intent at that time, he took two more days to decide whether to accept the bribe. He then continued his dealings with the Abscam operatives until he was arrested. As far as the undercover agents' alleged coercive tactics are

concerned, both courts below agreed that petitioner was not entitled to raise a defense of duress (see Pet. App. 5a-7a), and petitioner does not challenge that determination. Moreover, petitioner identifies nothing in the record that suggests that he was coerced into accepting the bribe. Petitioner did, at one point, suggest that he feared possible retaliation if he accepted the bribe and did not carry out his part of the bargain (see Pet. 10; Pet. App. 30a-31a); but that scarcely excuses petitioner's decision to accept the bribe.

Finally, petitioner objects (*e.g.*, Pet. 7-8, 12, 17) that the government did not have reasonable suspicion or probable cause to suspect him of a crime before it initiated its investigation of him; petitioner appears to contend that it violates separation of powers principles for the government to investigate a member of Congress in these circumstances. This Court has rejected this contention when it was made by other Abscam defendants,[1] and like them, petitioner fails to identify anything in the Constitution or in any of this Court's opinions that suggests any such requirement. Petitioner does not suggest, and cannot suggest, that he was investigated for any improper or impermissible reason, such as a desire to retaliate against him for his political views. Nor does petitioner suggest that his prosecution violated the Speech or Debate Clause, the principal protection Members of Congress enjoy against unwarranted prosecution. Indeed, petitioner does not identify any aspect of the Abscam operation that deviated from the course that would have been pursued by individuals who were in fact hoping to bribe a Member of Congress: they heard from an associate of the Member that the Member was a "crook"; they told the associate that they would be willing to bribe

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[1]See 82-1183 Pet. 9-14; 82-1199 Pet. 20-44; 82-1255 Pet. 24-27, 49-56. (These were the certiorari petitions filed in, respectively, *Lederer* v. *United States*, *Thompson* v. *United States*, and *Myers* v. *United States*. Certiorari was denied in each of these cases on May 31, 1983. (461 U.S. 961.)

the Member; and when the Member attended a meeting and showed full awareness that an attempt was being made to bribe him, and willingness to accept the bribe, they did not cease their investigation. In these circumstances, it was petitioner's willingness to accept a bribe — not the undercover agents' actions — that threatened the integrity of the legislative branch. See *United States* v. *Brewster*, 408 U.S. 501, 524-525 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1985

DOJ-1985-04

Office - Supreme Court, U.S.
FILED
MAY 2 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1171

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

JOHN W. JENRETTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

In a case laying bare the most serious dangers to our constitutional structure of separated and independent powers of the Executive and the Congress, the

best the Government can do in its Opposition is to run away from our Petition for Certiorari on the law and to mislead this Court grievously on the facts.

1. The Government suggests no legal standard by which to determine and prevent outrageous actions in violation of due process against members of Congress by undercover agents of the Executive. The Court below has interpreted this Court's silence on the issue of outrageousness as indicating that "due process guarantees are violated only in the narrow category of cases where the challenged conduct includes 'coercion, violence or brutality to the person.'" See Pet. 14. But, as we pointed out, id., neither precedent nor rational argument supports restricting "outrageousness" to physical action by the confidence men or the law enforcement officials. The Court

will look through the Government's Opposition in vain for any response or even reference to this vitally important legal issue lying at the heart of this case.

Obviously, the Government recognizes that it cannot defend the "physical" standard of outrageousness adopted by the Court below and recognizes equally that, if it were to propose a different standard, this conflict between the Government and the Court of Appeals would impel this Court to grant certiorari to examine the issue. So, instead of meeting petitioner's legal argument, the Government simply assumes that the Court will overlook its failure either to support the standard adopted below or to offer some semblance of an alternative.*

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* The Government's evasive position is all the more irresponsible here, coming as it does in the face of admitted

The Government's present posture concerning due process violations in Abscam-type cases can only be deemed "lawless," in the literal sense that there is now no law that the Government will defend, for determining the validity of conduct in executive undercover activities against Members of Congress. In the delicate area of Executive-Congressional relationships, a vacuum of this kind threatens the very separation of powers upon which our Constitution was built. The Executive apparently seeks to retain this lawless state of affairs; we most respectfully submit that this Court cannot permit it to continue.

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confusion among the lower courts which have considered the "elusive" standard now governing the "outrageousness/due process" defense and the special plea for "further Supreme Court elaboration" made by Judges Ginsburg and Robinson in the Kelly decision. See Pet. 17-18.

2. Unable to defend the proposition that the Executive may, without any basis for suspicion, pursue and test the moral fiber of a Member of Congress, the Government attempts to mislead the Court on the facts. It begins by misstating the "Question Presented," premising it upon "the government's investigation of petitioner ...." But there was no "investigation" of petitioner, only pursuit and seduction.

The District Court specifically found that the Government was conducting a "test of the integrity and moral fiber of a member of Congress," seeking to determine "whether an elected government official could be induced to commit a crime by a convicted professional con man." Pet. 60a. The FBI "pursu[ed] Jenrette for a period of at least seven months ... without even a reasonable

suspicion that he could be induced to accept the bribe." Id. 38a.*

In the face of these and other District Court findings directly to the contrary, Pet. 38a, 39a, 60a, 64-65a, JA II 699-700, 701, 702, the Government contends that its agents did not "target" or "test" or "pursue" petitioner, and seeks to manufacture a post hoc justification for actions of its agents. Opp. 5. But the Government's contention hangs on two false premises. First, the Government

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* This case thus differs from previous Abscam cases, where the Government could argue that its agents had proceeded on the basis of definite and specific information that the Members of Congress in question were willing to engage in corrupt actions and "jumped at the chance" to do so. See the Government's Opposition to petitions for certiorari in Lederer, 82-1183; Thompson, 82-1199; Myers, 82-1255; and Williams, No. 83-256; United States v. Myers, 692 F.2d 823 (2d Cir. 1982); United States v. Williams, 705 F.2d 603 (2d Cir. 1983). Other Abscam cases cited by the Government (Jannotti, Silvestri and Weisz) did not involve Congressmen.

alleges that in a taped October 1978 telephone conversation, Stowe told Weinberg that he believed "certain difficulties could be overcome because 'my contact is a Congressman.'" Opp. 2. But Stowe never said this. The only "difficulty" mentioned is Stowe's problem in contacting his busy Congressman. JA III 916. Second, the Government makes much of a joking remark by Stowe much later in the same conversation -- "He's as big a crook as I am. (Laughing)." Opp. 2,5.* Weinberg never even asked petitioner what he meant by either statement, and neither he nor the FBI agents working with Weinberg made the slightest effort to follow up on either the "contact" or "crook" aspect of the conversation. Thirteen months elapsed

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* The Government, in quoting the transcript of this tape recorded conversation, Opp. 2, crops the word "Laughing." See JA III 919.

between that Weinberg-Stowe conversation and the bribe offer -- all without the least suggestion that petitioner would be willing to commit any impropriety. See JA III 887-947.*

Actually, the FBI agent in charge of this matter admitted that he decided to go after petitioner merely because "it was a loose end that had to be clarified to the best of our ability prior to the conclusion of the covert stages ...." JA II 515. The bribe offer was extended merely "to call Mr. Stowe's bluff" by asking him to set up a meeting with Jenrette. JA II 306. Finally, the Abscam tapes demonstrate, and agent Amoroso admitted, that the Government agents had no infor-

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* The Government's use of the word "then" to imply immediacy (ten lines from the bottom on p. 5) when the time differential was thirteen months, is a deception not worthy of the United States, but consistent with cropping the word "Laughing" from a transcript.

mation that petitioner was willing to commit any illegal act. Pet. 7-8; JA III 887-952, 710-33. Bluntly put, the Government is fabricating a basis for pursuing petitioner with its bribe offer.*

3. In its desperate effort to divert the Court's attention from the dangers inherent in undercover activities against Congressmen, implemented with no standard or law to govern the agents'

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* The true facts concerning the lengthy pursuit of petitioner are simply omitted from the Government's Opposition. Thus there is no mention in the Opposition that in early October 1978 with nothing to go on except petitioner's drinking problem, convicted confidence man Weinberg called petitioner's constituent Jack Morris, who was charged with securities forgery, and suggested that Morris involve petitioner in his criminal problems -- because "'he's a lush anyhow. Give him a few drinks and he'd do anything.'" Pet. 5-6. Morris refused. Nor does the Opposition recount Weinberg's second unsuccessful effort to corrupt petitioner, when later that month, through Stowe, he sought to involve Jenrette in a plan to smuggle certificates of deposit into the United States. Now it was petitioner who said no. Id. at 6.

conduct, the Government stresses throughout the Opposition, twice in the very last two sentences, petitioner's "willingness" to accept a bribe. Pet. 5-8. But "willingness" goes to predisposition and entrapment; it has nothing to do with Executive misconduct in violation of due process. And, in this case "willingness" is a red herring, for Weinberg consciously exploited Jenrette's personal weaknesses, pursuing the Congressman for months before ultimately consummating his seduction. Pet. 5-8. The government seeks to shift the Court's attention from the basic threat of such Executive misconduct against the Congressional Branch to a point -- entrapment -- nowhere raised in the petition.

The Government's implication that "willingness" after the fact would somehow excuse the unrestrained misconduct of

its undercover agents in their efforts to corrupt a Member of Congress highlights the dangerous "anything goes" precedent set by the decision below and underscores the urgent need for review by this Court.

In conclusion, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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